

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 359

JOSEPH F. BLACK, ASSISTANT REGIONAL COM-
MISSIONER, ALCOHOL AND TOBACCO TAX
DIVISION (DALLAS REGION), INTERNAL REV-
ENUE SERVICE, PETITIONER,

vs.

MAGNOLIA LIQUOR COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

A [CAPTION]

PLEAS AND PROCEEDINGS had and done at a regular term of the United States Court of Appeals for the Fifth Circuit, begun on the first Monday in October, A. D. 1955, before the Honorable Wayne G. Borah, the Honorable Warren L. Jones, Circuit Judges, and the Honorable Benjamin C. Dawkins, Sr., District Judge:

MAGNOLIA LIQUOR COMPANY, INC., *Appellant*,

versus

CLAUD B. COOPER, ASSISTANT REGIONAL COMMISSIONER, ALCOHOL & TOBACCO TAX DIVISION, (DALLAS REGION), INTERNAL REVENUE SERVICE, *Appellee*.

BE IT REMEMBERED, That heretofore, to-wit, on the 15th day of March, A. D. 1954 a transcript of the record in the above styled cause, pursuant to an appeal from an Administrative Order issued by the Assistant Regional Commissioner, Alcohol & Tobacco Tax Division (Dallas Region) Internal Revenue Service, was filed in the office of the Clerk of the said United States Court of Appeals for the Fifth Circuit; that on the 22nd day of April, A. D. 1955 and on the 4th day of June, A. D. 1955, respectively, the Appendix and Supplemental Appendix to Appellant's and Appellee's Briefs in said cause were filed, containing those portions of the record as called for in the Joint Designation of Record filed in said cause, said appeal having been docketed on the 13th day of January, A. D. 1954 in said Court of Appeals as No. 14914, as follows, to-wit:

**APPENDIX TO APPELLANT'S AND APPELLEE'S
BRIEF—FILED APRIL 22, 1955**

Government Exhibit No. 2

34 ORDER TO SHOW CAUSE—February 7, 1952

United States of America,
Eastern Judicial District of Louisiana, ss.

S Docket No. 60 10th Supervisory District

In the matter of Permit FAA, No. 10-P-784

(Names) Issued to Magnolia Liquor Company, Inc.,
(Address) 328 N. Cortez St., New Orleans, La.

To Magnolia Liquor Company, Inc.
328 N. Cortez St., New Orleans, La.

Whereas the District Supervisor of 10th District had reason to believe, and does believe, that you have not con-
formed to the provisions of the laws and regulations,
35 particularly those specified on pages 2, 3, and 4 attached hereto.

Now, Therefore, by authority of Section 4(e), Federal Alcohol Administration Act¹ delegated pursuant to law, you are hereby ordered and cited to appear before Honorable Leland M. Rennolds, Hearing Examiner, at Postal Service Training Section, 2nd Floor, Federal Office Building, South Street, New Orleans, Louisiana, on the 4th day of March, 1952, at 11:00 o'clock in the fore noon (not less than 15 or more than 30 days from date of service), and show cause why the above permit should not be suspended—revoked¹ upon the grounds set forth on pages 2, 3, and 4 attached hereto and made a part hereof.

Dated this 7th day of February, 1952.

JOS. F. BLACK,
(Jos. F. Black),
District Supervisor.

¹ Strike out words not applicable.

I Do Hereby Certify that on the 7th day of February, 1952, I served the foregoing notice on² Magnolia Liquor Company, Inc. at 328 N. Cortez St., New Orleans, La. by registered mail to such person at the address above.

Dated this 7th day of February, 1952.

C. J. KLEINSCHMIDT,

(Signature of person serving or mailing)

Messenger, A. & T. T. D.
(Title)

36 1. You did willfully violate Section 5 of the Federal Alcohol Administration Act (Section 205, Title 27, United States Code) upon compliance with which (among other things) your wholesaler's basic permit (No. 10-P-784), issued pursuant to Section 4 of said Act, was conditioned, in that:

(a) Between December 1, 1950, and March 31, 1951, you did to such an extent as substantially to restrain and/or prevent transactions by other persons in interstate and/or foreign commerce in distilled spirits and/or wine, willfully engage in the practice of requiring, by agreement or otherwise, divers and sundry retailers engaged in the sale of distilled spirits and/or wine in Orleans, Jefferson, and St. Tammany Parishes, Louisiana, to purchase from you with each purchase of Johnny Walker's Scotch or Seagram's V. O. certain quantities of distilled spirits and/or wine to the exclusion in whole or in part of distilled spirits and/or wine sold and offered for sale by other persons in interstate and/or foreign commerce, in violation of subsection (a) of Section 5 of the said Federal Alcohol Administration Act.

(b) Between December 1, 1950, and March 31, 1951, you did to such an extent as substantially to restrain and/or prevent transactions by other persons in interstate and/or foreign commerce in distilled spirits and/or wine, willfully engage in the practice of inducing divers and sundry retailers engaged in the sale of distilled spirits and/or wine in Orleans, Jefferson, and St. Tammany Parishes, Louisi-

² If service be on partner or officer of corporation, state such fact.

ana, to purchase from you distilled spirits and/or wine to the exclusion in whole or in part of distilled spirits and/or wine sold or offered for sale by other persons engaged in interstate and/or foreign commerce, by requiring such retailers to take and dispose of a certain quantity of such distilled spirits and/or wine with each purchase of Johnny Walker's Scotch or Seagram's V.O., in violation of subsection (b) of Section 5 of the Federal Alcohol Administration Act.

(c) The divers and sundry retailers referred to in the preceding paragraphs identified as 1(a) and 1(b) are:

Richard J. Gillen—t/a Pat's Bar, 2215 Jefferson Hwy., Jefferson Ph., La.

Sam Lopiccio—t/a Jack's Inn, 7½ mile Post, Gentilly Road, New Orleans, La.

John Reba—t/a Front and Society Bar, 119 Exchange Place, New Orleans, La.

Frank Trosatty—t/a Frank's Bar, 751 St. Charles St., New Orleans, La.

Roy P. Brechtel—t/a Brechtel's Bar, 1509 S. Jeff. Davis Pkwy., New Orleans, La.

Jack New—t/a The New Bar, 8634 Pontchartrain Blvd., New Orleans, La.

Bing Crosby—t/a Bing Crosby's Liquor Store, 1756 Front St., Slidell, La.

Gus Argy—t/a Argy's Steak House and Bar, 119-121 University Place, New Orleans, La.

Paul B. Lemann—t/a Lafitte Hotel and Bar, 1003 Bourbon St., New Orleans, La.

38 Anthony Sinopolis—t/a Paramount Restaurant and Bar, 733 Iberville St., New Orleans, La.

2. You did knowingly and willfully violate Section 1101, Title 18, and Section 2857, Title 26, United States Code, and the regulations prescribed under such Section 2857 by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, upon compliance with which (among other things) your wholesaler's basic permit (No. 10-P-784), issued pursuant to Section 4 of the Federal Alcohol Administration Act, was conditioned in that:

(a) Between some day and date prior to December 1, 1950, the exact time being unknown, and January 31, 1952,

while engaged in the business of a wholesale liquor dealer as defined by Section 2857, Title 26, United States Code, you through your officers, agents, servants, and employees, did willfully, knowingly, and unlawfully make false and fraudulent entries in records required to be kept by law and regulations, which records are commonly known as Wholesale Liquor Dealers' Record (Forms 52-A and 52-B), by showing in column 5 of such forms and record that certain distilled spirits were bottled, rectified or distilled at Rectifying Plant 153, which rectifying plant 153 is located at Lawrenceburg, Indiana, and by showing in column 6 of such forms and record that certain distilled spirits were bottled, rectified or distilled in Indiana, when in truth and in fact such distilled spirits, known as Seagram's V. O., were distilled and/or rectified and bottled in Canada; which false and fraudulent entries were made for the purpose of and with the intention to deceive the Supervisor, 10th District Alcohol and Tobacco Tax Division, formerly known as the Alcohol Tax Unit, Bureau of Internal Revenue, such entries relating to a matter within the jurisdiction of a department and agency of the United States.

Government Exhibit No. 25

42 ORDER TO SHOW CAUSE—July 25, 1946

United States of America,
Eastern Judicial District of Louisiana, ss.

In the matter of Permit No. 10-P-784

(Name) Issued to Magnolia Liquor Company, Inc.,
(Address) 328 North Cortez Street, New Orleans, Louisiana.

Docket No. S-16

Docket No. S-60 Official Exhibit No. G-25

Disposition:

Identified

Received

Rejected

To Magnolia Liquor Company, Inc.,
328 North Cortez Street, New Orleans, Louisiana.

In the matter of Magnolia Liquor Co.

Date 4/9/52 Witness Christy Reported (Illegible)

No. Pages 2

Whereas the Deputy Commissioner of Internal Revenue District Supervisor of 10th District has reason to believe, and does believe, that you have not conformed to the provisions of the laws and regulations, particularly those specified on page 2 attached hereto;

Now, Therefor, you are hereby ordered and cited to appear before Linson R. Evans, Jr., Hearer, at Room 306, 1539 Jackson Avenue, New Orleans 13, Louisiana on the 6th day of August, 1946, at 10 o'clock in the forenoon (not less than 15 nor more than 30 days from date of service), and show cause why the above permit should not be suspended¹ upon the grounds set forth on page 2 attached hereto and made a part hereof.

Dated this 25 day of July, 1946.

(Name Illegible),
District Supervisor,
(Title of officer)

I Do Hereby Certify that on the 26th day of July, 1946, I served the foregoing notice on² David Rosenblum, Office Mgr., 328 N. Cortez St., N.O., La. by (a) delivering a copy of such notice to said person, or (b) by registered mail to such person at the address above.

Dated this 26th day of July, 1946.

ARTHUR F. CHRISTY,
(Signature of person serving or mailing).
Special Investigator,
(Title)

¹ Strike out words not applicable.

² If service be on partner or officer of corporation, state such fact.

44 *Numbered each ground and precede statement of particulars as to each with the statutory denunciation. For example, it should be charged as to permits revocable under Section 3114(b), I. R. C., "You have not in good faith conformed with Section, I. R. C., or Section, Regulations in that" etc.; and in the case of suspension, revocation, or annulment of permits issued under the Federal Alcohol Administration Act, vary charge to conform with Section 204(e), Title 27, U. S. C.

You did willfully violate Section 5 of the FAA Act (49 Stat. 981; 27 U. S. C. 205), upon compliance with which (among other things) your Wholesaler's Basic Permit (No. 10-P-784), issued pursuant to Section 4 of said Act, was conditioned, in that:

1. Between January 1, 1944, and February 12, 1946, you did, to such an extent as substantially to restrain and prevent transactions by other persons in interstate and foreign commerce in distilled spirits and/or wine, willfully engage in the practice of requiring, by agreement and otherwise, divers and sundry retailers, engaged in the sale of distilled spirits and/or wine in New Orleans, Orleans Parish, Louisiana, Kenner, Jefferson Parish, Louisiana, Metairie, Jefferson Parish, Louisiana, Baton Rouge, East Baton Rouge Parish, Louisiana, and St. Bernard Parish, Louisiana, to purchase from Magnolia Liquor Company, Inc., New Orleans, Louisiana, with each purchase of whiskey, to-wit, Vat "69" Scotch, Seagram 5 Crown, Kessler, Berke Bros. Blended, Teacher's Scotch, Seagram 7 Crown, Seagram V-O, Harvester, Hunter's, Harvey Scotch, certain quantities of distilled spirits and/or wine, or any of them, to-wit: Brugal Rum, Offley Portuguese Brandy, Don Listo Distilled Spirits, Don Listo Rum, Terry
45 Brandy, Larkmead Wine, Legendre Herbsaint, Cocktail Hour Liqueur, St. Croix Rum, Golan Wine, Berke Bros. Sloe Gin, Don Q Rum, 3 Starr Hennessy Brandy, Seagram Pedigree Gin, Bear Creek Whiskey, El Bart Gin, Berke Bros. Liqueur, May's River Whiskey, Bacardi Rum, Goddard Rum, and Ricardo Rum, to the exclusion, in whole or in part, of distilled spirits and/or wine sold and offered for sale by other persons in interstate and

foreign commerce; in violation of subsection (a) of said Section 5 of said Act.

2. Between January 1, 1944, and February 12, 1946, you did, to such an extent as substantially to restrain and prevent transactions by other persons in interstate and foreign commerce in distilled spirits and/or wine, willfully engage in the practice of inducing divers and sundry retailers, engaged in the sale of distilled spirits and/or wine in New Orleans, Orleans Parish, Louisiana, Kenner, Jefferson Parish, Louisiana, Metairie, Jefferson Parish, Louisiana, Baton Rouge, East Baton Rouge Parish, Louisiana, and St. Bernard Parish, Louisiana, to purchase from Magnolia Liquor Company, Inc., distilled spirits and/or wine, or any of them, to-wit, Brugal Rum, Offley Portuguese Brandy, Don Listo Distilled Spirits, Don Listo Rum, Terry Brandy, Larkmead Wine, Legendre Herbsaint, Cocktail Hour Liqueur, St. Croix Rum, Golan Wine, Berke Bros. Sloe Gin, Don Q Rum, 3 Starr Hennessy Brandy, Seagram Pedigree Gin, Bear Creek Whiskey, El Bart Gin, Barke Bros. Liqueur, May's River whiskey, Bacardi Rum, Goddard Rum, Ricardo Rum, to the exclusion in whole or in part of distilled spirits and/or wine sold or offered for sale by other persons in interstate and foreign commerce, by requiring such retailers to take and dispose of a certain quantity, namely one case, more or less, of distilled spirits

and/or wine, or any of them, to wit, Brugal Rum,
 46 Offley Portuguese Brandy, Don Listo Distilled
 Spirits, Don Listo Rum, Terry Brandy, Larkmead
 Wine, Legendre Herbsaint, Cocktail Hour Liqueur, St.
 Croix Rum, Golan Wine, Berke Bros. Sloe Gin, Don Q
 Rum, 3 Starr Hennessy Brandy, Seagram Pedigree Gin,
 Bear Creek Whiskey, El Bart Gin, Berke Bros. Liqueur,
 May's River Whiskey, Bacardi Rum, Goddard Rum, and
 Ricardo Rum, with each purchase of one case, more or less,
 of whiskey, to-wit, Vat "69" Scotch, Seagram 5 Crown,
 Kessler, Berke Bros. Blended, Teacher's Scotch, Seagram
 7 Crown, Seagram V-O, Harvester, Hunter's, and Harvey
 Scotch; in violation of subsection (b) of said Section 5 of
 said Act.

Government Exhibit No. 29

52 Docket No. S-16 Tenth Supervisory District.

United States of America,
Eastern Judicial District of Louisiana.

In the Matter of Wholesaler's Basic Permit No. 10-P-784

Issued to Magnolia Liquor Company, Inc.

STIPULATION—August 6, 1946

It is stipulated and agreed between the Alcohol Tax Unit, represented by Fred C. Farrell, District Supervisor, Tenth District, and Magnolia Liquor Company, Inc., the respondent herein, that the hearing on the merits of the Order to Show Cause, issued on July 25, 1946, to suspend the respondent's basic permit will be continued for an
53 indefinite period conditioned on the agreement hereby entered into that the said respondent agrees:

(a) hereafter not to violate Sections 5(a) and/or (b) of the Federal Alcohol Administration Act, and

(b) not to retaliate against any witness (retailer) who might have furnished evidence against the respondent.

This agreement shall not constitute an admission of liability by the respondent, nor the signing thereof prejudice the legal rights of either party in this, or any future proceedings. It is further understood that in the event the Government does not proceed with the hearing on the merits within twelve months from the date of the issuance of the citation, it may be dismissed on motion of the respondent.

New Orleans, Louisiana,
6th day of August, 1946.

**MAGNOLIA LIQUOR COMPANY,
INC.,**

By **STEPHEN GOLDRING,
FRED C. FERRELL,
(Fred C. Ferrell),
District Supervisor, Alcohol
Tax Unit, Tenth District.**

Government Exhibit No. 30

Name & Address—Date—Inv. No.—Items Purchased

Norman Autin
1433 St. Charles
New Orleans, La.

12/7/50 5620 3 bottles Cordial—3 bottles V. O.
12/14/50 7353 3 cs. 7-Crown—& cs. V. O.
12/21/50 9149 2 cs. 7-Crown— $\frac{1}{2}$ cs. V. O.
12/28/50 760 1 cs. 7-Crown—3 bottles V. O.
3 bottles gin—3 bottles V. O.

Royal Family Liquor Store
1728 St. Charles
New Orleans, La.

12/13/50 7082 2 cs. 7-Crown— $\frac{1}{2}$ cs. V. O.
12/19/50 — 2 cs. 7-Crown— $\frac{1}{2}$ cs. V. O.
6 bottles gin—6 bottles V. O.

A. Gagliano
501 St. Charles
New Orleans, La.

12/11/50 6121 4 cs. 7-Crown—8 bottles V. O.
12/28/50 549 $2\frac{1}{2}$ cs. 7-Crown—6 bottles V. O.
12/29/50 1107 3 cs. 7-Crown—6 bottles V. O.

55 D. Compagno
7839 St. Charles
New Orleans, La.

12/14/50 9126 1 cs. 7-Crown—2 bottles V. O.
12/21/50 7254 $\frac{3}{4}$ cs. 7-Crown—1 bottle V. O.

O. Di Christiana
2133 St. Charles
New Orleans, La.

12/18/50 8010 3 bottles Vermouth—3 bottles V. O.
1 cs. 7-Crown—3 bottles Scotch

Ched's Lounge
4139 St. Charles
New Orleans, La.

12/7/50 5545 1 cs. 7-Crown—2 bottles V. O.
12/29/50 1111 6 bottles 7-Crown—1 bottle V. O.

Name & Address—Date—Inv. No.—Items Purchased

J. Maselli
3726½ S. Claiborne
New Orleans, La.

11/21/50 1799)
11/27/50 2965) 30 cs. 7-Crown—5 cs. V. O.
12/ 1/50 4441)
12/ 4/50 4639) 30 cs. 7-Crown—6 cs. V. O.
12/ 4/50 5219) 2 cs. gin—2 cs. V. O.
12/ 6/50 4589) 5 cs. 7-Crown—1 es. Scotch
12/11/50 6367)
12/13/50 6805)
12/15/50 7624) 15 cs. 7-Crown—3 cs. V. O.
12/18/50 7992)
12/19/50 8472) 25 cs. 7-Crown—5 cs. V. O.
12/23/50 10) 30 cs. 7-Crown—5 cs. V. O.
12/28/50 556)
12/30/50 1428) 30 cs. 7-Crown—5 cs. V. O.

56 J. Henry Brown
1401 St. Charles
New Orleans, La.

12/22/50 9790 2 cs. 7-Crown—6 bottles V. O.

W. T. Boyne
3601 Airline Hwy.
New Orleans, La.

12/30/50 14477 5 cs. 7-Crown—1 cs. V. O.

Forets
3600 Airline Hwy.
New Orleans, La.

12/18/50 14077) 12 cs. 7-Crown—3 cs. V. O.
12/22/50 9794)
12/23/50 9886)
12/20/50 8815 1 cs. gin—1 cs. V. O.
12/26/50 69 5 cs. 7-Crown—1 cs. Scotch
1/ 2/51 1507 5 cs. 7-Crown—1 cs. V. O.
3 cs. 7-Crown—½ cs. Scotch

Name & Address—Date—Inv. No.—Items Purchased

L. Boudreaux
1032 St. Charles
New Orleans, La.

12/19/50 8311 1 cs. 7-Crown—3 bottles V. O.

Durr's Pkg. Store
3309 S. Claiborne
New Orleans, La.

12/ 7/50 5387 6 bottles gin—6 bottles V. O.

M. Rosato
4228 S. Claiborne
New Orleans, La.

12/ 8/50 5957 2 cs. 7-Crown—4 bottles V. O.

57 Jos. Palmisano
440 Shrewsbury Road
New Orleans, La.

12/ 7/50 5636 2 cs. 7-Crown—6 bottles V. O.
1 cs. gin—1 cs. V. O.

12/20/50 8832 18 cs. 7-Crown—3 cs. V. O.
5 cs. gin—5 cs. V. O.

12/27/50 436 12 bottles Vermouth—12 bottles Scotch
8 cs. 7-Crown—2 cs. V. O.
2 cs. gin—2 cs. V. O.

Rockery Liquor Store
3131 Gentilly
New Orleans, La.

12/ 7/50 5664 2 cs. 7-Crown—4 bottles V. O.

12/21/50 9383 2 cs. 7-Crown—6 bottles V. O.

12/28/50 824 2 cs. 7-Crown—6 bottles V. O.
3 cs. gin—3 cs. V. O.

Avenue Cafe & Bar
1605 Esplanade
New Orleans, La.

12/ 6/50 5189 2½ cs. 7-Crown—6 bottles V. O.
1 cs. gin—1 cs. V. O.

12/21/50 9209 1 cs. gin—1 cs. V. O.

12/28/50 559 2 cs. 7-Crown—8 bottles V. O.

Name & Address—Date—Inv. No.—Items Purchased

1/17/51 4123 5 cs. 7-Crown—1 cs. V. O.

1 cs. gin—1 cs. V. O.

1/24/50 5234 4 cs. 7-Crown—1 cs. V. O.

Weaver's Package

201 N. Galvez

New Orleans, La.

12/11/50 6126 6 bottles Vermouth—6 bottles V. O.

12/27/50 168 2 cs. gin—2 cs. V. O.

1 cs. 7-Crown—3 bottles Scotch

58

Remos' Bar

717 St. Charles

New Orleans, La.

12/ 7/50 5400 1 cs. gin—1 cs. V. O.

Permittee Exhibit No. P-I

Total Number of Cases of Wines and Liquors Shipped Into
the State of Louisiana

(Compiled by the Wine & Spirits Foundation of La., Inc.)

	1949 (Cases)	1950 (Cases)	1951 (Cases)
Gin	148,488	182,198	190,479
Blended Whiskey	769,058	633,441	527,692
Vermouth	3,669	12,773	12,344
Specialties (Including Cordials)	24,229	23,981	32,770
Total Wines and Liquors of all Kinds	1,769,260	2,008,763	1,877,936

Permittee Exhibit No. P-K

Shipments of Three Leading Brands of Blended Whiskey
Into the State of LouisianaCompiled by the Wine & Spirits Foundation of Louisiana,
Inc.

	1949		1950		1951 (6 mos.)	
	Cases	%	Cases	%	Cases	%
Total Blended Whiskey	769,058	100.0	633,441	100.0	277,591	100.0

	1949		1950		1951 (6 mos.)	
	Cases	%	Cases	%	Cases	%
Seagram						
7-Crown	238,724	31.0	193,659	30.5	57,071	24.2
59 Old Sunny-						
brook	94,595	12.2	84,991	13.4	42,972	15.5
Calvert Re-						
serve	65,343	8.6	64,895	10.3	24,447	8.7
All Others	370,396	48.2	289,896	45.8	143,101	51.6

Permittee Exhibit No. P-L

Shipments of Four Leading Brands of Gin Into the State of Louisiana

Compiled by the Wines & Spirits Foundation of Louisiana, Inc.

	1949		1950		1951 (6 mos.)	
	Cases	%	Cases	%	Cases	%
Total Gins	148,488	100.0	182,198	100.0	86,467	100.0
Gilbey's	42,546	28.7	56,350	30.9	26,042	30.0
Gordon's	52,310	35.2	58,437	32.1	31,856	36.8
Seagram's	15,225	10.3	14,890	8.2	7,949	9.3
Hiram Walker	1,351	7.6	18,039	9.9	7,880	9.3
All Others	27,056	18.2	34,482	18.9	12,740	14.6

Permittee Exhibit No. P-M

Relation of Total Sales to Sales to Ten Retailers Named in Citation

(By Cases)

	Total Sales Dec. 1, 1950 to Mar. 31, 1951	Sales to Ten Retailers	Percentage of Sales to ten retailers
V O	7067	26	0.3681%
7-Crown	29049	64 $\frac{1}{4}$	0.2211%
Gin	2050	12	0.5854%
Johnny Walker	1485	5-1/12	0.3423%
Cordials	300	1	0.3333%

60

Permittee Exhibit No. P-N

Total Number of Cases of Items Sold by Location Named
in Citation During December, 1950, January, February
and March, 1951 According to Government Proof.

	7- V.O. Crown Gin		Cordials & Scotch Vermouth	
Pat's Night Club, Richard Gillen ...	3	10	5	1 5
Jack's Inn, Sam Lop- icolo	13½	41	6	
Front & Society Bar, John Reba	½		½	
Frank's Bar, Frank Trosatty	1	4¼		
Tortorich Rest. & Bar, Jack New ...	1	1		
Bing Crosby's	4	6	2	
Argy's Place, Gus Argy	3	1	2½	
Paramount Rest. & Bar, Tony Sinopoli		2	1/12	
Totals	26	64¼	12	5-1/12 1 5

Permittee Exhibit No. P-O**Seagram V O Sales and Inventories**

61

	Opening Inventory	Received	Sales	Closing Inventory
December 1948 ...	403	1,708	1,328	783
December 1949 ..	1,586	1,400	2,623	363
December 1950 ..	62	4,100	3,287	935
December 1951 ..	639	3,175	2,784	1,030
January 1949 ...	783	900	891	792
January 1950 ...	363	1,150	854	659
January 1951 ...	935	1,800	1,472	1,263
January 1952 ...	1,030	2,500	2,595	935
February 1949 ..	792	1,025	953	864
February 1950 ..	659	950	1,226	383

	Opening Inventory	Received	Sales	Closing Inventory
February 1951 ..	1,263	625	1,208	680
February 1952 ..	935	2,550	2,676	809
March 1949	864	800	777	887
March 1950	383	1,860	1,352	891
March 1951	680	2,309	1,270	1,719
March 1952	809	1,500	2,033	276

Note: Item of "Sales" include one hundred ten cases transferred to Magnolia Liquor Lafayette, Inc.

Permittee Exhibit No. P-P

Sales of V.O., 7 Crown and Seagram Gin for the months of December, January, February and March in question.

	V.O.	7 Crown	Gin
December, 1950	3217	13,404	1,019
January, 1951	1372	5,638	410
February, 1951	1208	5,225	340
March, 1951	1270	4,782	281
	<hr/> 7067	<hr/> 29,049	<hr/> 2,050

✓ **ORDER** { **SUSPENDING** } **BASIC PERMIT**

(P.17-
63)

UNITED STATES OF AMERICA,

~~Eastern~~ Judicial District of ~~Indiana~~

In the matter of Permit No. ~~20-2-734~~

ISSUED TO

ss: { ~~South~~ Docket No. ~~60~~
~~South~~ Supervisory District.

~~ROBERTA LIQUOR COMPANY, INC.~~
(Name)
~~326 E. Carter St., New Orleans, La.~~
(Address)

An order or citation having heretofore issued directing the above-named permittee to appear before ~~Isabel H. Donnell~~, Hearing Examiner, and show cause why the above permit... should not be ~~suspended~~ and such order having been served and a hearing held thereon as required by law, and the said Hearing Examiner having rendered and served his decision, which decision is incorporated herein by reference, it is

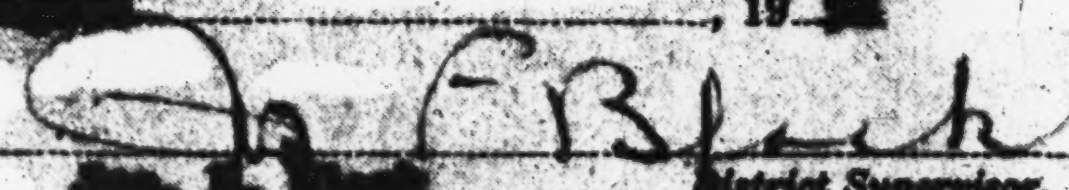
ORDERED, that permit No. ~~20-2-734~~ issued to ~~Roberta Liquor Company, Inc.~~ be, and the same hereby ~~is~~ ~~suspended~~ ~~for a period of suspension (45) days, beginning at 12:00 A.M. September 24, 1949, and ending at 12:00 o'clock midnight, November 3, 1949.~~

Dated this ~~22nd~~ day of ~~August~~, 19 ~~49~~

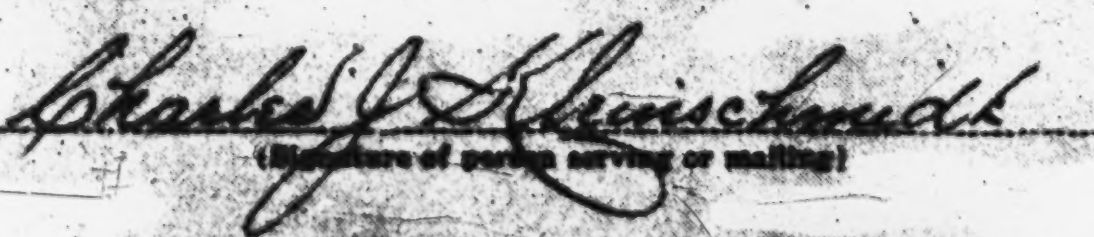
District Supervisor.

permit... should not be ~~suspended~~ and such order having been served and a hearing held thereon as required by law, and the said Hearing Examiner having rendered and served his decision, which decision is incorporated herein by reference, it is

ORDERED, that permit No. ~~20-2-734~~ issued to ~~Roberta Liquor Company, Inc.~~ be, and the same hereby ~~is~~ ~~suspended~~ ~~for a period of suspension (45) days, beginning at 12:00 A.M. September 24, 1949, and ending at 12:00 o'clock midnight, November 3, 1949.~~

Dated this ~~22nd~~ day of ~~August~~, 19 ~~49~~

District Supervisor.

I DO HEREBY CERTIFY that on the ~~22nd~~ day of ~~August~~, 19 ~~49~~,
I served the foregoing order on ~~Roberta Liquor Company, Inc.~~
at ~~326 E. Carter Street, New Orleans, La.~~
by ~~registered mail to such person at the address above.~~

Dated this ~~22nd~~ day of ~~August~~, 19 ~~49~~

(Signature of person serving or mailing)
~~Charles J. Rheinischmidt~~
(Title)

66 **Transcript of Hearing Before the Hearing Examiner,
Alcohol and Tobacco Division**

RICHARD JOHN GILLEN was called as a witness on behalf of the Government, and having been previously duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Milam:

Q. What is your name, please?

A. Richard John Gillen.

Q. Where do you live?

A. 404 Coolidge Street.

Q. Jefferson Parish?

A. Jefferson Parish.

Q. What business are you in?

A. Well, the bar and restaurant business, package liquor.

Q. Where is your place or places of business?

A. One at 2215 Jefferson Highway, 2024 Metairie Road, 440 Williams Street, Kenner, and one in Grand Isle.

* * * * *

Q. How long have you been engaged in that type of business?

A. Since December 1—December 5, 1933, since repeal.

67 Q. Do you sell intoxicating liquors at retail?

A. Yes, sir.

Q. Were you engaged in the sale of whisky at resale between December 1, 1950 and March 31, 1951?

A. Yes, sir.

Q. During that time did you purchase any whisky or other items for your business from the Magnolia Liquor Company?

A. I bought quite a bit.

Q. Which one of their salesmen called on you?

A. He is not really a salesman. I think he is an assistant manager or manager, Mr. Halpern, Jerry Halpern.

Q. Do you recall whether or not you bought any whisky from the Magnolia people in December 1950?

A. Well, December is our biggest month, and I buy whisky—I buy whisky every week, in fact from Magnolia, and all the houses, nearly all of them.

Q. Do you recall any conversation with Mr. Halpern in December 1950 concerning Johnny Walker Scotch whisky?

A. Well, I ordered some Johnny Walker, and I couldn't get it unless I bought something else.

Q. Did you buy the Johnny Walker?

A. Yes, I bought five cases at one time, a case or two at other times.

Q. What else did you buy besides the Johnny Walker?

A. One time I had to buy vermouth, which I still have.

* * * * *

Q. Did you at any time buy any cordial in order to get any Scotch?

A. I think I did. I'm not sure. I mean it has been over —it's over a year.

68 Q. Here are copies of two invoices furnished by the Magnolia Liquor Company, dated December 12, 1950. One is numbered 6636; the other, 6756. The latter shows a quantity of Johnny Walker and the other shows creme de menthe, among other things. Do you recall whether you made those purchases?

A. Well, I made the purchases. I imagine I did. I couldn't swear to it. I mean, it has been quite a while back, and I do a world of buying, and I couldn't remember every purchase.

Q. You do not, I believe, have your returned invoices?

A. No. We had them at the time, but the invoices have been destroyed. We had them in a warehouse, and the rats got into them and built nests in them. In fact, all my records except my books were destroyed.

Q. Would you be able to examine these copies which Magnolia has furnished and say from that examination whether or not you ordered that specific merchandise?

A. Yes, sir, I think so. Yes, sir those are my purchases.

Q. Do you recall the salesman you dealt with or the person that you dealt with on that occasion, or did you always deal with Halpern?

A. Well, 95 percent of the time. Sometimes Mr. Wilmer would call on me when Mr. Halpern was on his vacation or sick or something.

Q. What is the salesman's name—I mean number shown on these invoices?

A. I don't know. That is a code that Magnolia could tell you more about.

Mr. Morrisson:

Read it in the record, Mr. Milam. We will stipulate the number.

69 Mr. Milam:

The salesman's number that appears here is 19.

Mr. Steeg:

Mr. Halpern, salesman No. 19.

By Mr. Milam:

Q. You said previously that you were obliged to purchase wines or cordials in order to obtain Johnny Walker Scotch?

A. That's correct. That particular sale, I recall that, because the president of Avondale wanted a case of Johnny Walker Scotch, and I had to have it, because he was a very good customer of mine, and I couldn't get it unless I bought a case of cordials.

Q. Why do you say you couldn't get it unless you bought a case of cordials?

A. Well, they was just out of it.

Q. Well, would your buying a case of cordial help them to have it?

A. I imagine it did. I don't know how they worked their business.

Q. Who gave you the impression that you would have to buy cordial in order to get the Scotch?

A. Well, it was sort of implied by Mr. Halpern.

Q. What did he say about it?

A. Well, he said "If you order some cordials, we may be able to find a case of Johnny Walker."

Q. And you ordered the cordial?

A. And I got the Johnny Walker.

Q. Johnny Walker is what, Scotch whisky?

A. A Scotch whisky.

Q. That is not manufactured in this country, is it?

A. No, sir. It is imported.

70 Q. Do you recall any other occasions when you talked with Mr. Halpern concerning the purchase of either Johnny Walker or any other whisky?

A. Well, V. O. was pretty hard to get, but I did all right by purchasing Seagram 7, which I needed.

Q. You purchased Seagram 7 along with Seagram V. O.?

A. Well, no. I purchased the 7, and then I'd get an allocation of V. O.

Q. In other words, you had to buy the 7 to get the V. O.?

Mr. Morrison:

I object to that, putting the words in his mouth.

Mr. Milam:

I will reframe the question.

By Mr. Milam:

Q. What did Mr. Halpern say to you about the V. O.?

A. Well, every time I'd buy five cases, he'd send me one case of V. O. He didn't say that, but every time I bought, if I bought 25, I got five cases of V. O..

During Christmas there I needed quite a bit more than that, so I had to buy an extra amount of Seagram which I had to store.

Q. What do you mean, "I had to buy an extra amount of Seagram which I had to store"?

A. Well, I couldn't sell it all in that particular—I could get rid of the V. O., but not the Seagram.

Q. Why did you buy the Seagram if you couldn't get rid of it?

A. Well, I got rid of it eventually, maybe in three or four months, but there was a little bit more than I
71 needed at the time, but I needed the V. O. at that particular time, because when a man gives you an order, if he orders V. O. and you don't have V. O., he generally takes the whole order and gives it to someone, with the hard-to-get items.

Q. Why didn't you order V. O. by itself?

A. No. We couldn't get it. They were out of it.

* * * * *

Q. Did you buy any Seagram gin?

A. Yes. I bought ten cases.

Q. Was that in demand with your trade?

A. No. Seagram gin is a very slow seller. It is just starting to move in the last few months.

Q. Why did you buy the Seagram's gin?

A. Well, I was promised 25 cases of V. O.

Q. Did you get the V. O.?

A. I got it eventually. I didn't take it all at once. I got five; I believe, five a week, something like that.

Q. Who promised them to you?

A. Mr. Halpern.

Q. Do you use Gordon's gin?

A. Yes, sir.

Q. Do you use Gilby's gin?

A. Yes, sir.

Q. Are they popular at your bars?

A. Two of the most popular items, that is, in the gin line.

Q. Why didn't you buy either Gordon's or Gilby's, instead of Seagram's?

A. I did buy Gordon's and Gilby's, but we have to have that so we buy that all the time.

Mr. Morrisson:

Gilby's?

72 The Witness:

Gilby's and Gordon.

By Mr. Milam:

Q. Why didn't you buy Gordon's and Gilby's instead of Seagram's?

A. Because they didn't have any; that is, the company handling those lines didn't have V. O.

Q. Then you bought the Seagram's to get the V. O.?

A. Well, that's correct.

Q. If that situation hadn't existed, would you have bought more or less of Gordon's or Gilby's?

A. I buy the same amount; Gilby—I mean Seagram's didn't sell, so I was just carrying it. I carried it over a year before I got rid of it.

Q. What sort of vermouth do you carry?

A. We handle about 18 brands.

Q. You handle Cinzano?

A. Yes, sir.

Q. Where do you buy it?

A. I bought it from Magnolia Liquor Company.

Q. Is that popular at your bars?

A. No, sir.

Q. Why do you buy it?

A. To get some Johnny Walker Scotch.

Q. Had it not been for your desire to obtain Johnny Walker Scotch, would you have bought Cinzano vermouth or some other kind of vermouth?

A. I would have bought other vermouth that sell.

Q. Do you pour Seagram's gin at your bar, as a rule?

A. No, sir.

Q. Why?

A. Too expensive.

Mr. Milam:

Tender the witness, if You Honor please.

73

Cross Examination.

By Mr. Morrisson:

Q. You don't mind if I ask you a few questions, do you?

A. No, sir.

Q. I didn't understand you at the start. Did you say you had three retail stores?

A. Four.

Q. You buy for all of them yourself?

A. I do about 90 per cent of the buying.

Q. Do you own all four stores?

A. Yes, sir.

Q. Are they located close together?

A. Well, they are all in Jefferson Parish.

Q. About how far apart are they?

A. Well, Grand Isle is a hundred miles from one of my stores.

Q. The other three are close to your Jefferson Highway store?

A. Metairie is about two miles and Kenner is about seven.

Q. When you bought from Magnolia, did you buy all those stores or for just the Jefferson Highway store?

A. No, I buy for all of them.

Q. Did you even transfer merchandise between one of your stores and other?

A. Well, they all draw from me. The manager comes in maybe two or three times a week and picks up what he needs, and I'll bill him for it, and they pay me at the end of the week.

Q. So when you are talking about your business and your sales you are really telling us about the business of all four stores?

A. Yes, sir.

74 Q. Now, the one on Jefferson Highway, is that a combination package store and drink?

A. It is a bar, restaurant and package.

Q. In other words, you sell by the drink and you sell by the bottle?

A. Yes, sir.

Q. And I suppose, if you can, you sell by the case, is that right?

A. That's right.

Q. Now, the other stores, are they combinations similar to the Jefferson Highway store?

A. All but Metairie. I closed the restaurant up about, I'd say, five months ago.

Q. I didn't understand you. They were combinations?

A. Bar and restaurant.

Q. Not package?

A. Well, package too. In other words, we sell package, bar and restaurant.

Q. You have any idea how much business in dollar volume you do in the month of December?

* * * * *

The Witness:

I say, my bookkeeper is in the Courtroom. He is my lawyer, attorney and bookkeeper.

By Mr. Morrisson:

Q. What I am trying to get at, you are probably a pretty big outlet?

A. You mean how much volume in four places?

Q. Yes, sir.

A. You mean 1950, December of '50?

Q. Yes, let's take December of '50.

A. I'd say \$150,000.

75 Q. I believe you said December was one of your very good months?

A. It is the biggest month of the year.

Q. Is January a good month?

A. Well, December is the only real month that we have. January is a normal month.

Q. Then Mardi Gras is a good month, isn't it?

A. Mardi Gras.

Q. When does that come?

A. Mardi Gras falls in February sometime. I don't know.

Q. Would you say that the Mardi Gras period was about as good as Christmas?

A. It is not one-fifth as good as Christmas.

Q. But it is better than normal?

A. It is one day.

Q. Let's ask you some other questions. Do you buy from other wholesalers in New Orleans?

A. Yes, sir.

Q. They all solicit your business, don't they?

A. Yes, sir.

Q. Is the competition pretty keen in your business?

A. Yes, sir.

Q. From whom do you buy normally, what other wholesalers?

A. Grabenheimer—

Q. Sir?

A. Grabenheimer, Pan American, Glazer, New Orleans Beverage, Illis, Abalona, Strauss. That's all I can recall right now.

Q. They are all located in New Orleans, is that right?

A. Yes, sir.

Q. And you get your purchases from New Orleans plants?

A. Yes, sir.

76 Q. I believe you said you buy every week?

A. Yes, sir.

Q. Is that right? You buy from all of these other wholesalers every week also?

A. Well, if I need it, but Pan American and Magnolia and Glazer I believe I buy every week.

Q. Every week. Isn't it a fact that you buy what you need so that you have got it on hand for your trade?

A. That's right, sir.

Q. I presume you bought from all these other wholesalers with whom you say you dealt during the period of December through March?

A. Yes, sir.

Q. What brands of blended whisky were you handling during that period?

A. Oh, I'd say probably handled about 75.

Q. Seventy-five different ones. Why do you handle that many?

A. Public demand.

Q. Public demand?

A. That's right.

Q. Does the public buy by brands on blended whisky?

A. They buy by brand.

Q. You have got to keep what they call for?

A. Yes, sir. In other words, we don't use any salesmanship. We just let them buy. In fact, we work very close. We are working on less than six percent in case lots, six percent on a single package.

Q. How is Seagram 7 Crown with respect to public demand from your stores?

A. It has really increased in the last few months, last six months.

Q. I am talking about 7 Crown now.

A. Seagram 7 has increased its volume; with me, that is.

77 Q. Well, how was it in December 1950 as compared with other blended whisky?

A. Very slow.

Q. Very slow?

A. Yes, sir.

Q. You happen to know which is the largest selling blended whisky in the New Orleans area?

A. No, sir, I don't.

Q. How many gins did you carry during December through March of this period we are talking about?

A. I'd say nine.

Q. Nine different gins?

A. Yes, sir.

Q. Why did you carry that many?

A. Public demand.

Q. Did anyone ever tell you that you had to buy all of your blended whisky and all of your gin from Magnolia?

A. I don't understand that.

Q. Did anybody ever tell you you had to handle only 7 Crown?

A. Well, that'd be ridiculous.

Q. I know it is, Mr. Gillen, but I am asking the question.

A. No, sir.

Q. Did anybody ever tell you that you could only handle Seagram's gin?

A. No, sir.

Q. What would happen to them if they did?

Mr. Milam:

If Your Honor please, that is getting too far afield.

78 By Mr. Morrisson:

Q. Did you and Magnolia ever make an agreement requiring you to handle only Seagram's blended whisky or Seagram's gin?

A. No, sir.

Q. Did Magnolia ever require you in any other way to handle only Seagram blend whisky or Seagram gin?

A. No, sir.

* * * * *

Q. You have told Mr. Milam about a few transactions you had with Magnolia. As a consequence of those transactions which you described, do you consider your houses as exclusive outlets for Magnolia products?

Mr. Milam:

We object.

Hearing Examiner:

I think that would be strictly a conclusion of the witness as to whether it is an exclusive outlet. He has already testified he handled 75 brands of spirits.

You may proceed to question the witness.

A. The answer is "No."

By Mr. Morrisson:

Q. Did you ever regard yourself as an exclusive outlet for Magnolia?

Mr. Milam:

Objection.

A. No, sir.

79 Mr. Milam:

Exception.

By Mr. Morrisson:

Q. As a result of these transactions you have described to Mr. Milam, were your stores dominated or controlled by Magnolia?

Mr. Milam:

Objection.

Hearing Examiner:

Mr. Milam, when you object elaborate a little and state the grounds of your objection.

Mr. Milam:

Well, to that particular question, I would say it is irrelevant, incompetent and uninteresting.

Hearing Examiner:

What was the question? Will you read it?

* * * * *

Q. I don't know whether this will help you out. I hope it will. I show you invoice No. 9313. Does that refresh your memory on the question of whether or not you got a discount on the vermouth?

A. It looks like it.

Q. How much?

A. Would be two-fifty a case.

Q. What was the price of the vermouth without the discount?

A. \$20.34.

Q. Off of which you got two and a half?

80 A. Yes, sir.

Q. Didn't you buy the vermouth because of the discount?

A. No, sir. We got four dollars on Noilly Prat.

Q. You get four dollars on Noilly Prat?

Q. Yes.

Q. If you hadn't bought this vermouth, would you have bought Noilly Prat vermouth?

A. If I needed it, I would have bought it.

Q. From whom would you have bought the Noilly Prat vermouth?

A. The New Orleans Beverage.

Q. Is that a local wholesaler?

A. Yes.

Mr. Tunick:

May I ask your indulgence for just a moment?

Hearing Examiner:

By Mr. Morrisson:

Q. I believe you mentioned the purchase of 7 Crown, 135 cases, was that it?

A. I don't recall how much, but I know I made a big purchase around the end of the year, which they come out and say it was only open to a few outlets. Mr. Halpern told me they were offering the deal to a few outlets. That was around the end of the year, and they wanted to make a good showing. In fact, they were behind their quota. They wanted to meet their quota.

Q. On 7 Crown?

A. Yes. He offered me two and a half a case on discount, which I took.

Q. That is the first time you had ever gotten a discount?

81 A. First and last time.

Q. So that was a very special deal, wasn't it?

A. I believe it was a hundred cases.

Q. In other words, anybody who bought a hundred cases or more would get a discount?

A. It was either a hundred or hundred and a quarter. I don't recall offhand.

Q. The discount was two and a half?

A. Two and a half a case.

Q. So you had the proposition put to you that the Magnolia wanted to increase their sales before the close of the year?

A. That's right.

Q. And they were offering a special deal to only a few retailers?

A. That's correct.

Q. You were one of them. You took advantage of the deal?

A. That's right.

Q. At that time, you didn't buy the V. O., did you?

A. I couldn't say whether I did or not.

* * * * *

Q. Did Magnolia require you to sell a certain quantity of Seagram blended whisky in any specified period of time?

A. I have to meet a quota?

Q. You might characterize it as that.

A. Well, I mean, I don't think any liquor house would make you meet a quota. They are not giving any deals.

Q. I am not talking about deals. I am asking, were you required to sell a specified quantity of Seagram's blended whisky in a specified period of time?

A. Well, what would be the reason for that?

82 Q. I don't know. It's a crazy question, but I want your answer.

A. No.

Q. Did Magnolia require you to take a specified quantity, either of their Seagram's blended whisky or their Seagram's gin?

A. No, sir.

Q. In order to handle those products at all?

A. You mean I had to buy a certain amount to handle them?

Q. To get them at all, yes.

A. Well, I imagine you couldn't buy one bottle or one half pint. I imagine you'd have to buy a certain amount. I don't know. I'm not a small buyer. I buy a case or maybe a half case. But I don't know what they limit the quantity to.

Q. What you have in mind, they wouldn't run a truck way out in the parish to deliver you one bottle; is that what you mean?

A. Yes. I imagine we'd have to buy some bottles. We generally buy a case or maybe six bottles.

Q. A convenient delivery size?

A. Yes, sir.

Q. Other than that, you weren't required to—

A. No, sir.

Q. —take any given amount in order to handle the line at all?

A. No, sir. Just large enough order that they'd ship, not too small.

* * * * *

Q. That one case of creme de menthe which you purchased from Seagram heretofore referred to, could you give us any idea about how long that remained on your shelves?

* * * * *

83 A. Well, it's limited. I have expanded too fast.

Q. Now, if you hadn't tied your money up in the Seagrams's gin, as you say, in order to get other merchandise, wouldn't that money have been available to you for the purchase of other brands of gin?

* * * * *

A. I don't know whether I bought gin. I bought most anything with it, I guess, although I hate to tie my money up unless there is some setup.

Q. It would have been available to you to purchase other merchandise, wouldn't it?

A. I imagine it would be.

Mr. Milam:

Your Honor, that is all unless you have something you want to ask him.

Hearing Examiner:

Any further questions?

Mr. Morrison:

Give me a minute, please.

Re-Cross Examination.

By Mr. Morrisson:

Q. Did you ever offer to return to Magnolia any of the Seagram blended whisky, any of the ten cases of gin, or any of that case of creme de menthe that you bought, or any of the five cases of vermouth that you bought?

A. Well, I asked Mr. Halpern if he'd like to buy it back, and he told me no. I am speaking of vermouth.

Q. But you never asked them to take back any of the other?

84 A. No, I didn't. I mean, I had already gotten the merchandise that I was after, so I couldn't very well ask him to take it back.

Mr. Morrison:

That is all.

* * * * *

SAM LOPICCOLO was called as a witness on behalf of the Government, and having been previously duly sworn, testified as follows:

Hearing Examiner:

You have been sworn, have you not?

The Witness:

Yes, sir.

Hearing Examiner:

Have a seat right here, please, sir.

Direct Examination.

By Mr. Milam:

Q. What is your name?

A. Sam Lopiccolo.

Q. Where do you live?

A. Seven and a half milepost, Gentilly Highway, Box 218.

Q. Are you in business there?

A. Yes, sir.

Q. What is your business?

A. Bar.

* * * * *

85 Q. Were you in the barroom business in December 1950?

A. Yes, sir.

Q. At that time did you buy any merchandise from Magnolia Liquor Company?

A. Yes, sir.

Q. Do you recall the name of the salesman that served you?

A. Yes, sir.

Q. What was his name?

A. Mr. Brown, and Mr. Weber was, I think,—is the representative.

Q. They both called on you?

A. Yes, sir.

Q. Do you have any of the invoices of—

A. Yes, sir.

Q. —liquors that you purchased?

A. Yes, sir.

Q. During December 1950?

A. Yes, sir. I have them all here with me.

Q. Take invoice No. 5220.

A. I have it, sir.

Q. What is the date of that, please?

A. December 6, 1950.

Q. The name of the salesman?

A. I don't think it is on here, sir.

Q. What merchandise was shown on that invoice?

A. Seagram's fifths, 7 Crown, two cases; one case, half pints, of Seagram 7 Crown; one case, half gallons, of Seagram 7 Crown; five cases of V. O., Seagram's V. O.

Mr. Morrisson:

Are you reading that right, sir?

86 The Witness:

I think, sir. Would you like to see it?

Eight bottles sir, I'm sorry.

By Mr. Milam:

Q. Did you have any conversation with Mr. Brown at the time you gave that order?

A. Well, if I recall, that whisky was going to be short at that particular time, and we spoke on that line, that that would be the time to start buying, and that's what I did; and I bought quite a bit.

Q. Did you have any strong demand for Seagram's 7 Crown?

A. Yes, sir, I do.

Q. Did you for Seagram's V. O.?

A. Beg pardon, sir?

Q. How about V. O.?

A. Very well, sir.

Q. That is a good seller?

A. Yes, sir.

Q. Do you have there invoice No. 5374?

A. What is that number again, sir?

Q. 5374.

A. Yes, sir.

Q. Does that invoice show any gin?

A. Yes, sir, three cases, Seagram's gin.

Q. Did you have many calls for Seagram's gin? Was that a popular seller?

A. No, sir, not at my place.

Q. Why did you buy it?

A. Well, in order to get some V. O. and Seagram 7, which was supposed to be short.

Q. Did Mr. Weber or Mr. Brown tell you that in words or substance?

A. Yes, sir.

87 Q. Do you have their invoice No. 9014?

A. Yes, sir.

Q. Does that invoice show any gin?

A. Yes, sir, three cases.

Q. Why did you buy the gin at that time?

A. To get the merchandise that I wanted, sir.

Q. What merchandise did you want?

A. 7 Crown and V. O.

Q. Did they give you about the same proportions of whisky and gin on both occasions?

A. No, sir; on this invoice here I bought a lot more whisky than I ordinarily buy.

Q. Do you serve Seagram's gin at your bar?

A. Yes, sir.

Q. Is it a popular gin?

A. No, sir, not at my bar.

Q. How does the price compare with other gins?

A. It is a little higher, sir.

Q. Now, you have testified that it was indicated to you either in words or substance that you would have to buy gin in order to get the whisky?

A. That's correct, sir.

Q. If you hadn't bought Seagram's gin or hadn't been obliged to buy Seagram's gin, what gin would you have bought?

A. Well, at that particular time I was using Walker's gin, and a little Gilby's gin.

Q. Are they cheaper than Seagram's gin?

A. To the best of my knowledge, yes, sir.

Q. Seagram's V. O., of which you speak, is what, a Canadian whisky?

A. Yes, sir.

88 Q. You didn't fail to buy all of the Gilby's, Hiram Walker's and Gordon gin that you needed, did you?

A. No, sir, I bought it as I needed it.

Q. As you needed it?

A. Yes, sir.

Q. And you wanted to be sure you had it on hand for your trade when asked for it?

A. That's right, sir.

Q. I take it then you kept Gilby's and Gordon's and Hiram Walker's gin in inventory all the time?

A. Well, yes, sir.

Q. Had you not bought the Seagram gin, would you have bought any other gin?

A. Well, no, sir. I still, you know, had the same previous Hiram Walker and Gilby's, those three particular brands, but I did have Seagram's gin on hand at all times.

Q. You carry that because that is required for your trade too, isn't it?

A. Yes, sir. But I'll say—I won't go any further. In other words, I wouldn't carry as much as I did of Seagram's because it is not a big seller.

Q. Now, with respect to blended whisky, if you hadn't bought the Seagram 7 Crown, what other blend whisky would you have bought?

A. I wouldn't know, sir. I tell you why I say that, because Seagram's is one of my biggest sellers, and I have always got quite a bit of Seagram's since I have been in business.

Q. You really think you wouldn't have bought any other anyway, any other blended whisky?

A. Well, I probably would have, yes, sir. I would have, with the idea in mind, whisky was all going to get short.

Q. I believe you said Seagram's 7 Crown was one of your biggest sellers?

89 A. That's right.

Q. The reason you bought it in this case was because you knew you could sell it?

A. That's correct, sir.

Q. Do other wholesalers solicit your business?

A. Yes, sir.

Q. What are they, New Orleans wholesalers?

A. New Orleans wholesalers, just about all of them, sir.

Q. Do any wholesalers from out in the parish solicit your business?

A. Not that I know of, no.

Q. Your business is entirely—

A. Strictly in New Orleans.

Q. Did anyone from Magnolia ever tell you that you had to buy all of your blended whisky and gin from them?

A. No, sir.

Q. Did anyone from Magnolia ever tell you that you couldn't buy blended whisky or gin from any other wholesaler?

A. No, sir.

Q. Did anyone from Magnolia ever make an agreement with you requiring you to handle only Seagram blended whisky and Seagram gin?

Mr. Milam:

We still object to that.

A. No, sir.

Hearing Examiner:

I will overrule your objection.

90 By Mr. Morrison:

Q. Did anyone from Magnolia ever require you in any other way to handle only Seagram blended whisky and Seagram gin?

A. No, sir.

Q. You don't consider yourself as an exclusive outlet for Magnolia products, do you?

A. No, sir.

Q. Now, as a result of the purchases that you have described to Mr. Milam, was your establishment controlled or dominated by Magnolia?

A. No, sir, not whatsoever.

Q. Did Magnolia ever require you to sell a specified quantity of blended whisky or Seagram's gin?

A. To sell; no, sir.

Q. To sell a specified quantity of either of them within a specified period of time?

A. No, sir, no, sir.

Q. Did anyone from Magnolia ever require you to take a specified quantity of 7 Crown or Seagram gin in order to sell those brands at all?

A. Well, if I understand that statement correctly—

Q. If you don't understand the question—

A. Repeat it, sir.

Q. Did anyone from Magnolia require you to take a specified quantity of 7 Crown or Seagram gin in order to sell those brands at all?

A. Oh, no, sir. Those two particular brands?

Q. Yes.

A. No, sir. In other words, are you trying to say, did I have to buy Seagram 7 to get—

Q. Yes.

A. The gin to get the Seagram 7?

Q. Yes. Do you have to take a specified quantity of 7 Crown in order to have it on your shelf at all?

91 A. No, sir, no, sir.

Q. And the same thing applies to the Seagram gin?

A. That's right; no, sir.

* * * * *

Re-Direct Examination.

By Mr. Milam:

Q. The whiskey and gin which we have referred to in those invoices, has that been paid for?

A. Yes, sir.

Q. Your place of business is on Highway 90, is it not?

A. That's correct.

Q. That is one of the main national highways from coast to coast, is it not?

A. That's correct.

Q. Mr. Lopiccio, that six cases of gin, Seagram's six, could you tell us about how long that stayed on your shelves?

A. Well, I still have it.

Q. Still have some of it?

A. Yes.

Q. That was bought December of 1950?

A. That's correct, sir.

* * * * *

Q. Have you bought other gin since that Seagram's gin has been on your shelves?

A. Yes, sir.

Q. Do you know this gentleman here (indicating)?

A. Yes, sir.

Q. Who is he?

A. Mr. Weber.

92 Q. Is he the one you referred to as a representative of Seagram's?

A. Yes, sir.

Mr. Milam:
That is all.

GUS ARGY was called as a witness on behalf of the Government, and having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Milam:

Q. What is your name, sir?

A. Gus Argy.

Q. Where do you live?

A. 116 South Johnson, New Orleans.

Q. Are you in any business at the present?

A. No, sir.

Q. Were you formerly in business, we'll say, in December 1950, January 1951?

A. Yes, sir.

Q. What was your business at that time?

A. A bar, lounge, 119-21 University Place.

Q. Is that near the Roosevelt Hotel?

A. Yes, facing the Roosevelt Hotel.

Q. Just across, University Place?

A. That's right.

Q. You sold whisky by the drink, I presume?

A. By the drink and also some by the bottle, ~~but~~ not very much. Most of it was by the drink.

93 Q. Did you buy supplies from Magnolia Liquor in December 1950 or January, February 1951?

A. Yes, sir.

Q. Were you able to bring any of your invoices for the merchandise you bought at that time?

A. Yes, sir.

Q. Will you look at invoice dated December 30, 1950? The number is 14483.

(Discussion off the record.)

Q. (Continuing) What merchandise does that show, please?

A. It shows one case of Seagram's 7 Crown, six fifths of gin, one case of Seagram's V. O., and one case of Hill Bond.

Q. Did you pour Seagram's gin at your bar?

A. Yes, sir.

Q. Was there a strong demand for it?

A. No, sir.

Q. Why did you buy the Seagram's gin?

A. Well, on December 30, 1950, at the beginning of that week, which I would say was around December 21st or 22nd, the Magnolia man came over and I gave him an order. Of course, I didn't include any gin, just a case of V. O. So on the 30th was Saturday, and I needed some V. O. for my New Year's business, and I called the office and I asked him why the order hadn't been delivered. And they told me that they can't deliver the order unless I buy some gin with it, because there was a shortage of V. O. So I went down and picked up the order myself; and then in January, the 25th, the salesman came by and said he'd sell me two cases of V. O. if I'd buy two cases of gin, which

I gave him the order for it. That is invoice No. 5437.

94 Q. Do you know what salesman called on you or who you talked with?

A. I'd know him if I see him, but I don't remember his name, sir, because they change salesmen there often enough.

Q. Does your invoice show that he had a number, that there was a salesman's number on the invoice, telling who the salesman is?

Mr. Steeg:

Mr. Charles, Salesman No. 2; Salesman No. 2 is Mr. Charles.

By Mr. Milam:

Q. Now, they say that Salesman 2 is a Mr. Charles. You talked with him about it?

A. Yes, Mr. Charles. After this order was received, he come over and asked if I want to repeat the same order, about ten days after I received this merchandise, and I told him no because I had so much gin on hand I didn't know what to do with it. In fact, I was loaded with gin.

Q. Did you talk to a Mr. Wilmer?

A. Yes, I spoke to him on the phone. That was the party I spoke to on the phone, and he told me that they weren't

delivering any merchandise on Saturdays, and it was a Saturday when I wanted the merchandise, the 30th of December 1950.

Q. What gin did you ordinarily serve at your bar?

A. Well, we serve almost all kinds of gins, you know, variety of gins; but the demand for Seagram gin was the lowest of it. The people didn't seem to demand the Seagram's gin as much as they do other gins; for instance, Gordon's and Dixie Bell and other gins that is in the markets.

95 Q. Would you have bought the Seagram's gin if you had not been obliged to buy it in order to get the V.O.?

A. No, sir.

Q. You would not?

A. No, sir, I had too much on hand already.

Mr. Milam:

Tender the witness, Your Honor.

Q. You have told us about buying two and a half cases of gin; two cases on one order in January and a half case in December, is that correct?

A. Yes.

Q. If you had not bought those two and a half cases of Seagram gin, whose gin would you have bought?

A. I wouldn't have bought any kind at all because I had sufficient on hand.

Q. When you say you had sufficient gin on hand, would you mind telling us what brands you had on hand?

A. Well, I had some Gordon's gin; I had some Dixie Bell; and I believe I had some imported gin. I think it was made in South America. I don't remember exactly the name of it now. But I had about, when I sold out, anywhere between 15 and 20 cases of gin.

Q. I believe you testified you bought a case of 7 Crown on December 30th. Did you have any on hand when you bought it?

A. Yes, sir. See, I was doing business with Magnolia Liquor Company for a good many years, and all my dealings were very satisfactory until the end of 1950. The

96 ~~last two or three months of 1950~~ they were trying to press the gin mostly than anything else, but previous to that they never tried to press me. They had begun around November of 1950 and January 1951. Previous to that I did a good many thousand dollars worth of business with them; they were very satisfactory.

Q. Including 7 Crown?

A. Yes.

Q. Including 7 Crown?

A. Yes, sir.

Q. Now, during that period that you have described, you also bought Seagram gin, didn't you?

A. Gin?

Q. Gin, yes.

A. Yes.

Q. You bought it because it was required for your place of business?

A. No, sir.

Q. I am not talking about December. I am talking about this prior period.

A. That's right. I bought Seagram's gin all along, but I bought what I needed, for instance, you know, because we try in the liquor business to keep everybody's merchandise on display. If someone comes in there and wants such a brand of gin, we have it there to serve. But the demand for Seagram's wasn't as much as for the rest of the gin.

Q. How many brands of blended whiskey did you carry?

A. Oh, I'll say, well, I can't truthfully tell you exactly the amount, but we have—I used to keep behind the bar anywhere from about 180 to 200 bottles open stock, which represents different brands of whiskey and gins, liqueurs, rums, Scotches and different things; about 200 bottles of open stock behind the bar.

97 Q. You handled that many different brands because your trade called for that much?

A. That's right.

Q. If you hadn't bought this case of 7 Crown in December, would you have bought any other blended whisky?

A. Well, in the regular routine of business every week I kept a pretty good stock on hand. Every week I was giving an order to almost every whisky dealer in town, a case or half a case or two cases, depending on what each

was selling. But on Seagram's I had a pretty good stock on hand; in fact, I was using Seagram's 7 until the day when I sold out. I mean Seagram's 5, and Seagram's 5 had been out of the market for several years before it. But I had so much stock on hand of 5 that after the discontinuance of Seagram's 5 I still had, when I disposed of my place, some Seagram's 5 on hand. Seagram 7, used to buy it, for instance, in eight or ten cases at a time.

Q. I think you misunderstood my question because you are drifting a little on me.

If you hadn't bought this case of 7 Crown in December, would you have bought any other blended whisky?

A. Well, not necessarily, because I had sufficient stock on hand.

Q. Of other kinds of blended whisky?

A. Yes, sir. There was a shortage on that V. O., not on 7 Crown. 7 Crown was plentiful on the market. V. O. was the shortage.

Q. Now, let me ask you this: Did anyone from Magnolia ever tell you that you had to buy all of your blended whisky or gin from Magnolia?

A. That if they asked me that question?

Q. Did they tell you you had to buy all of your blended whisky or gin from them?

A. No, sir, not that way. But they told me that in order to get the V. O. that I had to buy gin.

98 Q. That wasn't what I asked you, Mr. Argy. Did they ever tell you that you had to buy all of your blended whisky from them?

A. All the blended whisky I was selling in my place? No, sir.

Q. Did they ever tell you you had to buy all of your gin from them?

A. No, sir.

Q. Did anyone from Magnolia ever tell you that you could not buy blended whisky or gin from any other wholesaler?

A. No, sir.

Q. Did anyone from Magnolia ever make an agreement with you requiring you to handle only Seagram blended whisky and Seagram gin?

A. No, sir.

Q. Did Magnolia ever require you in any other way to handle only Seagram blended whisky or Seagram gin?

A. No, sir.

Q. Now, as a consequence of these purchases of two and a half cases of gin and one case of 7 Crown which you have described from the Government, did you regard your establishment as dominated or controlled by Magnolia?

A. No, sir.

Q. Did Magnolia or any of its people ever require you to sell a certain quantity of Seagram blended whisky within a specified period of time?

A. No, sir.

Q. Did they ever require you to sell a certain quantity of Seagram gin within a certain specified time?

A. Well, not for me to sell, but they tried to sell to me.

Q. You just catch my question now; the same question that I asked you with regard to blended whisky.

Did they ever require you to dispose of a certain quantity, or may I say it to you as a quota of gin within the specified period of time?

A. Yes, sir, try to push their gin; tried to dispose of their gin or tried to sell more of their gin over my bar. They didn't try to force me to do it, but they asked me to do it.

Q. They asked you to?

A. That's right.

Q. They asked you to buy all their products, didn't they?

A. Sir?

Q. They asked you to buy all their products, didn't they?

A. Well, more so, gin.

Q. I notice you have got an invoice here for Heaven Hill whisky. That is sold by Magnolia, isn't it?

A. That's right.

Q. That is not a Seagram product, is it?

A. That I don't know. I'm talking about the Magnolia Liquor Company, not the Seagram people themselves, never come to see me or try to sell me anything. All my purchases are done through Magnolia Liquor Company.

Q. Didn't Magnolia sell you Heaven Hill whisky?

A. Yes, sir.

Q. They asked you to buy it, didn't they?

A. That's right.

Q. Didn't they ask you to buy Manischewitz wine?

A. Well, they tried to sell anything they handle.

Q. That's right, that's right; good salesman, wanted to sell you everything he could?

A. That's right.

Q. Now, didn't every wholesaler act that way?

100 A. Sir?

Q. Didn't every wholesaler act that way?

A. More or less, yes.

Q. They tried to sell you everything they could?

A. Correct.

* * * * *

Testimony of JOHN REBA

Q. Where do you live?

A. You mean the residence or business place?

Q. Residence.

A. 1119 Dale Court.

Q. What business are you in?

A. Barroom.

Q. Where is it located?

A. 119-121 Exchange Place.

Q. Have you been in business long?

A. Since 1946.

Q. Were you engaged in that business in January 1951?

A. Yes.

Q. Did you buy any merchandise from Magnolia Liquors?

A. Yes, sir.

Q. Do you recall if you were buying from them in January 1951?

A. Yes, sir.

Q. Do you have with you any invoices of merchandise that you bought in that month?

A. Yes, I have.

Q. Do you have there one for January 11, 1951; the number should be 3118.

A. It is '51, huh?

Q. '51, yes, right at the first of the year.

A. January 11th, that's right, 3118.

101 Q. What did you get on that merchandise?

A. Three bottles V. O., and six bottles of gin.

Q. You know what salesman called on you?

A. Yes, man.

Q. Which one?

A. A fellow named Charlie. He is right there in the hallway right now. I don't know his last name. They change them so many times you can't even recognize them most of the time.

Q. Is Seagram's gin a good seller at your bar?

A. Well, yes, it is.

Q. How about V. O., is that popular?

A. What's that?

Q. V. O., is that popular?

A. Yes. I didn't have enough to sell the V. O. myself.

Q. What do you mean, you "didn't have enough"?

A. I didn't get enough, which I asked for it. They wouldn't give it to me. When I asked for it, he said, "Get some Seagram 7 or gin to get the V. O." Now, lately, I get all I want.

Q. You are getting it now, aren't you?

A. Yes.

Q. But you weren't getting it in January 1951?

A. No, sir.

Q. Now did you happen to get V. O. on that invoice there?

A. You mean the six bottles of gin?

Q. Yes.

A. The man tell me "If you take six bottles of gin, I give you three bottles of V. O."

Q. You took the gin and got the V. O.?

A. Sure. I have plenty of gin at stock at that time. We had all different kinds of gin. I got a small business. I try to make a living, that's all. They won't treat me right anyway.

102 Q. How much difference is there between Seagram's gin and other gins?

A. It is a difference, about three dollars a case, I believe, three, four dollars, depending on what kind of gin. There is different brands gin, you know.

Q. Did you want this gin you got?

A. I didn't care to get it, no.

Q. If you hadn't bought that, would you have—

A. Because I have already gin, Seagram gin, and I have a case and a half already, I have in stock, you see. Takes a long time to get rid of a case and a half of gin, you know, specially winter-time; people don't drink gin in the winter-time.

Q. If you hadn't bought that gin in the winter-time—

A. They won't give it to me, no V. O., no.

Q. Would you have bought some other gin if you hadn't had that?

A. No, because I have plenty of gin there.

Q. You had plenty?

A. At that time, yes.

FRANK TROSATTY was called as a witness on behalf of the Government, and having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Milam:

Q. What is your name?

A. Frank Trosatty.

Q. Where do you live?

A. 751 St. Charles.

103 Q. Are you in business?

A. Yes, sir.

Q. What is your business?

A. Bar.

Q. Is the bar at 751 St. Charles Street, New Orleans?

A. Yes, sir.

Q. Were you in business there in December 1950 and January 1951?

A. Yes, sir.

Q. At that time were you buying any merchandise from Magnolia Liquors?

A. Yes, sir.

Q. Do you recall offhand what you were buying?

A. Well, yes, Seagram's V. O., and in order to get that I had to order some other.

Q. Do you have any of your invoices for around that period?

A. Yes, sir.

Q. Do you have them with you? Look at the one for December 27th.

A. 27th? Yes, sir.

Q. That is invoice No. 224, is it not?

A. Yes, sir.

Q. Salesman No. 2?

A. Sir?

Q. What salesman? Does it show what salesman?

A. That is December 27, 1950.

Q. What merchandise did you get on that bill?

A. Well, I got 7 Crown, and also 7 Crown half pint, 7 Crown half pint, Seagram V. O.; that is pint; Seagram's V. O., again. The total bill was \$20.86—no, \$125, that is.

Q. Seagram's 7 Crown a good seller at your place?

A. Fair.

Q. Was it one of the better sellers?

104 A. Well, yes.

Q. Was the V. O. a good seller?

A. Pretty, good, fair, got too many brands of whisky.

Q. How did you happen to buy the Seagram's V. O. and the Seagram's 7 Crown at that particular time?

A. Well, you see, I went to get some Seagram V. O. They couldn't give it to me unless I buy Seagram 7 with it.

Q. Where did you get that idea?

A. Well, that's what was told me by the salesman.

Q. That is you didn't buy some 7 Crown you couldn't have any V. O., is that right?

A. Well, didn't have to buy 7 Crown, could buy some other stuff, something else besides Seagram V. O.

Q. And so you bought 7 Crown?

A. That's right.

Q. Did you do that more than one time?

A. Well, it was about a couple of times that happened; particularly I can not recall, say, one, two, three times anyway.

Q. Do you have an invoice for January 17th?

A. The 17th?

Q. January 17th, yes, sir.

A. That is '51, right?

Q. Yes, sir.

A. Yes, sir. /

Q. Did you get V. O. and 7 Crown on that invoice?

A. Yes. I got about three bottles; V. O., a fifth.

Q. Do you have an invoice for January 31st?

A. Yes, sir.

Q. Did you get both V. O. and 7 Crown on that invoice?

A. Yes, sir.

Q. Has all the merchandise that you bought from Mag-

nia Liquor Company in December 1950 and January 1951
been paid for?

105 A. All in cash, sir, C. O. D.

Q. If you had not been obliged to buy the 7 Crown
in order to get the V. O., would you have bought the
7 Crown?

A. Well, if I couldn't get the V. O. with it, I'd have to
have the 7 Crown.

Mr. Morrisson: . .

Will you say that again?

The Witness:

I didn't get clear what you said.

By Mr. Milam:

Q. Would you have bought the 7 Crown?

A. If I couldn't get the V. O.?

Q. If you couldn't, if you could have bought it without
getting the V. O., would you have bought it?

A. Naturally, I had to, because I had to have it.

Q. You had to have the V. O.?

A. No, I had to have the 7 Crown. If I couldn't get
V. O., I had to get—

Q. Yes, but would you have bought the 7 Crown without
the V. O.?

A. Without the V. O.? If he is going to give me V. O.,
yes, I had to have it—if that is clear.

Q. If you could have gotten the V. O. without the
7 Crown, would you have bought it?

A. Yes, sir.

Q. You would have bought it without the 7 Crown?

A. Yes, sir.

Q. Would you have bought the 7 Crown without the V. O.?

A. Well, if he couldn't get me V. O., I had to have 7
Crown anyhow, yes.

106 Q. You had to have it?

A. I couldn't be out of both of them.

Q. You had to take the 7 Crown to get the V. O., is that
what you mean?

A. That's right. If I couldn't get V. O., I had to get
the 7 Crown anyhow; but in another case, now, on this
bill here, I couldn't get really—I didn't need the 7 Crown.
In order to get the V. O., I had to order the 7 Crown.

Q. You didn't need the 7 Crown, but in order to get the V. O. you had to take the 7 Crown?

A. That's correct.

Q. Then you wouldn't have bought the 7 Crown by itself?

A. Not alone.

Q. I wonder if you understood my question. Did they ever tell you that you had to buy all of your blended whisky from Magnolia?

A. No.

Q. As a matter of fact, you didn't?

A. No, that's my own free will.

Q. Did anyone from Magnolia ever tell you that you couldn't buy blended whisky from any other wholesaler?

A. Never.

Q. Did anyone, you and Magnolia, ever make an agreement requiring you to handle only Seagram's blended whisky?

A. No.

Q. Did Magnolia ever require you in any other way to handle only Seagram's blended whisky?

A. Well, sometimes might have some other brand, if I want to buy. I say no. I'd like to stick with Magnolia —I mean with the 7 Crown.

107 Q. That is because you like 7 Crown?

A. Yes, like now, we take—what do you call—gin; in my section gin don't go, so I don't order it.

Q. I was talking about whisky.

A. Whisky, all right. No, they are pretty good fairness.

Q. Now, as a consequence of your having bought this 7 Crown that you described for the Government, did you regard yourself as an exclusive outlet for Magnolia merchandise?

A. Sir?

Q. Did you regard yourself as an exclusive outlet for Magnolia's merchandise, because you bought this 7 Crown?

A. You mean—I don't get your question.

Q. You know what I mean by "exclusive outlet"?

A. No, sir, say it the other way.

Q. You still thought you could handle any other brand you wanted?

A. That's right; in other words, nobody can tell me "Buy this and buy that."

Q. You buy from anybody.

A. I use my own judgment.

Q. Magnolia never did tell you otherwise?

A. Never, never.

Q. Nobody from Magnolia ever tried to control your business?

A. No, they never did.

108 BING CROSBY, was called as a witness on behalf of the Government, and having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Milam:

Q. Your name, please, sir?

A. Bing Crosby, sir.

Q. Where do you live?

A. Slidell, sir.

Q. What business are you in there?

A. I have a package liquor store, sir.

Q. You are not the man that sings, are you?

A. No, sir. I get ribbed about that quite often, sir, but I am not the man that sings.

Q. How long have you been in the liquor business?

A. I have been in the liquor business since '46. Now, I haven't been in the retail end; I was—I have been in the whisky business since '46, but it hasn't always been retail. I was in the wholesale.

Q. What wholesale business are you connected with?

A. I was connected with Glazer.

Q. When did you open your store in Slidell?

A. I went to Slidell in February, about February 21, '49.

Q. You were in business there in January and February of 1951?

A. Yes, sir.

Q. Did you buy from Magnolia Liquors?

A. Yes, sir.

Q. What salesman called on you?

A. Mr. Alex Baudin from Baton Rouge.

Q. Do you have with you any of your invoices for January '51?

109 A. Yes, sir.

Q. Look at January 7, please; 4212 is the number.

A. I have January 18th, sir.

Q. What is the number?

A. Invoice 4212.

Q. That's the one. My date is perhaps incorrect. What merchandise did you get on that order?

A. Case of Seagram 7 in fifths, case of pints, case of halves, two cases of V. O., and a case of half pints of Seagram gin.

Q. That is V. O., 7 Crown and gin?

A. Yes, sir, that's two, three, five, six cases.

Q. Seagram's gin a good seller at your store?

A. I wouldn't say the best seller, no, sir.

Q. Why did you buy this gin on this occasion?

A. Seagram gin moves, I'd say, fair. Well, they have gin to sell just like anybody else, sir, and they want to sell it; and so there wasn't any special reason. He wants his full line in, and I gave him an order for the gin.

Q. What about the 7 Crown?

A. 7 Crown moves all right, sir.

Q. How about the V. O.?

A. V. O. moves fair. It is either V. O. or Canadian Club. I mean, they'll move neck and neck.

Q. Any particular reason why you bought the V. O. with the 7 Crown and the gin on that occasion?

A. Yes, sir. They wanted to sell the gin along with the V. O., I mean, to show distribution.

Q. What do you mean, they wanted to sell it along with the V. O. Come on now, let's have it.

A. Well, in other words, a fellow likes his entire line in the store.

Q. If you just took the V. O., you wouldn't have his entire line, would you?

A. No, sir.

110 Q. You'd have to take the 7 Crown and the gin to have the entire line?

A. Well, I sell both of them, sir.

Mr. Morrisson:

Wait a minute. We object to that. He hasn't said that at all.

By Mr. Milam:

Q. That is the entire line, isn't it?

A. No, sir. I believe, sir, that they have 7 Crown and V. O. and the gin. I believe there might be some other brands that Seagram makes that I don't know about.

Q. Did you have to buy the V. O. in order to get the 7 Crown and the gin?

Mr. Morrisson:

Let's confine that question, Mr. Examiner, to what he was told by the salesman.

Mr. Milam:

All right.

Q. Where were you told by the salesman with reference to you had to buy the 7 Crown and the gin to get the V. O.?

A. Well, it makes it easier. Could I use that phrase, sir?

Q. What did he tell you?

A. He told me that he'd like to see the Seagram gin in there, and I bought the gin, and the gin sold.

Q. In order to refresh your recollection, didn't Mr. Baudin tell you in words and substance that the Magnolia Liquor Company would not sell Seagram's V. O. 111 whisky without Seagram's 7 Crown whisky or Seagram's gin?

A. Yes, sir.

Q. Was that the reason then why on January 31, 1951 you bought Seagram's V. O. and gin? Is that why you ordered the gin in that particular order?

A. No, sir. I wouldn't say that was the full reason. Having been on both sides of the fence, I could see his point. I have known the salesman for quite some time, and I could see both sides of it, sir.

Q. In other words, you didn't object to having the gin forced on you in order to get the V. O.?

Mr. Morrisson:

Object to that. He is putting words in the witness' mouth. There is nothing in the record about being forced.

Hearing Examiner:

Shouldn't lead the witness.

Mr. Milam:

Perhaps I misunderstood his answer. I asked him a moment ago that, in order to refresh his recollection, if the salesman with Magnolia, Mr. Baudin, did not tell him in words or substance that the Magnolia Liquor Company would not sell V. O. without Seagram's 7 Crown or Seagram's gin. And he answered, as I recall, in the affirmative.

Did you or did you not answer me in the affirmative?

Mr. Morrisson:

Just a moment. The witness, as I understand, has been trying to point out the difference between good salesmanship, and he is trying to say this is a case of good salesmanship, and not a case of forcing. That is why I object to putting words in his mouth about forcing.

112 This witness knows what a salesman's duties are and what his approaches are better than any other retailer. I think he is a very capable witness, on how salesmen approach the retailer, and that's what he is trying to tell you.

Mr. Milam:

Let's go back and read the record.

Q. Was there any discussion of policy between you and Baudin, I mean policy of the Magnolia Company in connection with the order of January 31, 1951?

A. Mr. Milam, if I understand your question, sir, I believe—I had been told the policy; I mean, as far as what was expected, sir. I told that to Mr. Carrier that, now, they didn't hold me to the policy that he stated to me, sir, if that is your question, sir.

Q. What was that policy?

A. The way I understood it, to the best of my knowledge, sir, was seven cases of Seagram's 7 Crown with one case of V. O., or case of gin with one V. O.

Q. Where did you get that information?

A. That is Mr. Baudin's relation.

Q. He told you that was the Magnolia Liquor's policy?

A. Yes, sir, to the best of my knowledge that is true.

Q. Now, what did your order of February 14th include?

A. Invoice of February 15th.

Q. Perhaps it is. 9266?

A. 9266 is right, sir. Case of fifths of Seagram's 7, a case of pints, case of halves, a case of half pints of gin, and two cases Seagram V. O.

113 Q. Has that stuff all been paid for by you?

A. Yes, sir, yes, sir.

Q. On December 20th didn't you buy a case of V. O. with nothing else?

A. December 20th? Yes, sir, December 20, 1950.

Q. Now, can you tell us why you bought that case of V. O.?

A. Yes, sir. I was short at that particular time, and I sent in for it. That case was picked up direct from Magnolia.

Q. In other words, I take it you bought it because you needed V. O.—I mean, needed 7 Crown?

A. No, no, sir, that particular invoice you called, sir, is just one case of V. O. alone.

Q. I see. All right. Now, there was nothing said at that time about having to buy 7 Crown, was there?

A. No, sir. I don't know the conversation at that particular time because I had had someone to pick it up for me.

Mr. Crosby, did anyone from Magnolia ever tell you that you had to buy all of your blended whisky or gin from Magnolia?

A. That I had to buy all of my blended whisky and gin from Magnolia?

Q. That's right.

A. No, sir, I have never been told that.

Q. Did anyone from Magnolia ever tell you that you couldn't buy blended whisky or gin from any other supplier?

114 A. No, sir.

Q. Did you and Magnolia ever make an agreement requiring you to handle only Seagram blended whisky and Seagram gin?

A. No, sir.

Q. Did Magnolia ever require you in any other way to handle only Seagram blended whisky and Seagram gin?

A. Repeat that, please.

Q. Did Magnolia ever require you in any other way to handle only or exclusively Seagram blended whisky or Seagram gin?

A. No, sir.

Q. Did Magnolia or anyone from Magnolia require you to sell a certain quantity of Seagram blended whisky within a specified period of time?

A. No, sir.

Q. How about gin?

A. No, sir.

Q. Did anyone from Magnolia ever require you to take a specified quantity of Seagram blended whisky in order for you to handle Seagram blended whisky at all?

A. Repeat that, sir.

Q. Did anyone from Magnolia ever require you to take a specified quantity of Seagram blended whisky in order to handle Seagram blended whisky at all?

A. A specified quantity? No, sir, they didn't, no specified quantity, no.

Q. What would be your answer with respect to gin on that question?

A. The same. There wasn't any specified that I had to take. Was that the question?

Q. In order to get it in your bar at all, do you—or did you have to take a specified quantity?

A. No, sir, no specified quantity.

115 Q. Now, as a result of these transactions which you described for the Government, did you consider your store as an exclusive outlet for Magnolia products?

A. No, sir.

Q. As a result of these purchases, did Magnolia control or dominate your business?

A. No, sir.

Q. As a result of these purchases, did you consider that you were a tied house for Magnolia?

A. No, sir.

Q. After you bought this 7 Crown that you have

described for the Government, did you continue to buy all of the other whisky that you needed?

A. Did I continue to buy, after buying from Magnolia, did I continue to buy from others?

Q. Yes, sir.

A. Yes, sir, I continued.

Q. Bought all you needed?

A. Yes, sir.

Q. You have been a good customer of Magnolia, haven't you?

A. Well, I don't know how to answer that.

Q. You have been buying from them regularly for some time, haven't you?

A. Yes.

Q. Still buy from them, don't you?

A. Yes.

Q. Quantities for the size business you have?

A. Yes, sir.

116 Hearing Examiner:
Very well.

JACK NEW was called as a witness on behalf of the Government, and having been first duly sworn, testified as follows:

By Mr. Milam:

Q. What is your name, sir?

A. Jack New.

Q. Where do you live?

A. 7520 Pontchartrain Boulevard.

Q. What business are you in?

A. I am not in any business at present. I sold the business out last month.

Q. You have formerly operated a bar or cocktail lounge?

A. Yes, sir.

Q. Where was that located?

A. 8634 Pontchartrain Boulevard.

Q. Were you engaged in that business about January 1951?

A. Yes, sir.

That's when I took it over.

Q. Did you, we'll say January of '51, buy any whiskies, wines or gin from the Magnolia Liquor Company?

A. Not on January, I don't know of the dates. I have my invoices when I did buy though here. I don't know just the dates.

Q. Look for January of '51 and see if you have anything.

117 A. January 1st was my first order, I'm sure. It is under the name of Peter Tortorich.

Q. What merchandise did you get on that order, Mr. New?

A. That order?

Q. Yes, sir.

A. Six—looks like six bottles of—six half pints, Seagram 7 Crown, three quarts of Seagram 7 Crown, one bottle of brandy, Five Star brandy, six bottles of Petri port, fifths, three bottles of fifths of Petri muscatel, three bottles of fifths, claret, two bottles of fifths, blackberry julep, two bottles of fifths Seagram's V. O.

Q. How much Seagram's V. O. did you order?

A. Well, I just don't remember offhand on this order.

Q. How many bottles did you say you got?

A. Two.

Q. What salesman called on you?

A. His name is Arsaga. I don't know how you spell it. I think it is Arsaga.

Q. Did you have any conversation with him about the respective quantities of merchandise?

A. At that time I was new in the business, the first time I was ever in that kind of business. I don't recall myself ever saying anything about that, because I was trying to stock up a little of each. You see, the place I run was mostly a beer house. It wasn't much of a liquor house at all, draft beer.

Q. Do you know Mr. Stephen Goldring?

A. Who?

Q. Mr. Stephen Goldring, Mr. Goldring, Magnolia.

A. Yes, I always thought it was Goodman. I didn't know it was Goldring.

Q. Do you see him in the Courtroom?

A. Sir?

118 Q. Do you see him in the Courtroom? Can you point him out here?

A. No, he is not here. This is Goodman. I always thought his name was Goodman. I never knew him by the name of Goldring. I believe this man is a representative from Canada. I'm not sure.

Q. Did you talk with him?

A. Yes, he came to my place.

Q. What conversation, if any, took place?

A. Well, we had a—he bought a drink and—he came out there from—one of my friends sent him out there, and he says—I asked him—I had quite a few at that time V. O. customers. Of course, that was later on now. This wasn't—this was latter part of January, I'm sure, I think. And I had quite a few V. O. customers, and I wanted to get some V. O. Well, sometimes I'd order four bottles and get two, and so he came out there and intro—

.

Q. What firm or who did this person you speak of say that he represented, if anyone?

A. Well, he didn't say. To my imaginations, I thought he was connected with Magnolia. But he was—I know him to be a V. O. man. Now, I don't know whether he worked for Magnolia or who he worked for, but I figured that he worked for Magnolia, because when I said I'd take what he said, "You take a case of gin; you can have a case of V. O."—

Q. What we are trying to find out—

A. Mr. Goodman—excuse me for changing the subject—well, like I say, he didn't exactly say, but when I mentioned that, he took the order. Now, I don't know who he took the order for, but the order was sent out by the Magnolia people.

119 Q. Do you know what invoice that is?

A. Yes, sir. I have it right here. What do you want, the date?

Q. Invoice 181, I believe, isn't it?

A. On the 26th, that I received it.

Q. Maybe the number is 5849, the invoice number.

A. Yes, 5849, I see here.

Q. What did you get on that invoice?

A. One case of fifths, Seagram's gin, and one case of fifths of Seagram's V. O.

Q. You received the merchandise?

A. Yes, sir.

Mr. Milam:

I believe that sufficiently establishes now, whoever this person may have been, he was in some respect connected with Magnolia, because he received the merchandise upon the order which he gave this particular individual; the merchandise came, he says.

Hearing Examiner:

Is it an invoice by the Magnolia Company?

The Witness:

Yes, sir.

Hearing Examiner:

Did you pay for that purchase?

The Witness:

I paid with a check, yes, sir.

Hearing Examiner:

To whom did you pay it?

120 The Witness:

The delivery man, the driver.

Hearing Examiner:

I know, but how did you make the check out?

The Witness:

To Magnolia Liquor Company, Inc.; I'm positively sure. I can locate the stubs if it is necessary.

Hearing Examiner:

I think that identifies the salesman as a representative of the company.

Mr. Steeg:

We'd like to state for the purpose of the record, if Your Honor please, Mr. Goodman is a missionary man employed by and solely employed by the Seagram Company, and that his job is to go around and contact these various

dealers, and if an order is given he has a right to send the order in to Magnolia, and Magnolia has the right to honor it. But any representations, any statements which he may make, any policy that he states is the policy of Seagram's, he is not an employee of Magnolia Liquor Company, and we have no control over him. We honor the order if the order can be filled because he is sending in an order from a customer to Magnolia. The fact that we delivered the order, the fact that we received payment for it would not bind us by the representations made by this gentleman, who is not our employee.

Mr. Milam:

I should think that would be a matter of proof.

121 Hearing Examiner:

That brings up other points. There is no evidence in the record as to who Mr. Goodman is. There is no evidence in the record establishing the fact what the connection between Mr. Goodman and Magnolia and the Seagram Company is. There has been no evidence on any of that.

Q. What gin did you ordinarily use at your bar?

A. Well, mostly Dixie Bell.

Q. Why?

A. It was cheaper, and I didn't charge—I charged the same price for all gin. But naturally—

Q. What was your reason for buying the Seagram's gin that you got with invoice No. 5849?

A. He said if I bought—Mr. Goodman said if I bought a case of gin I could have a case of V. O.

Q. You bought the gin to get the V. O.?

A. That was my understanding.

Q. Would you have bought the gin if you could have gotten the V. O. without the gin?

A. No.

Q. Would you have bought Dixie Bell gin instead?

A. I would have, yes.

Q. As a matter of fact, Mr. New, in March you did

get a quantity of V. O. without having to buy any gin, did you not?

A. In March?

Q. Yes, March 27th.

122 A. Well, it was loosening up then. By that expression, I could—

Q. You nevertheless did get V. O. without gin?

A. Well, sometimes, sometimes. Well, I bought something else, either 7 Crown, because the salesman always said, "Don't you want something else?" As soon as he would come in, first thing I'd say, "If you can't give me V. O., you'd just as well not come in." Just kidding with him.

Q. He always asked you if you wanted to buy something else?

A. Yes.

Q. Now, Mr. New, you are the sole proprietor of your business, are you not?

A. I was then.

Q. And you made all of the purchases?

A. Yes, sir.

Q. Magnolia Liquor Company didn't tell you what to purchase, did they? They didn't tell you?

A. No, they didn't tell me what to purchase.

Q. They didn't tell you the only liquor you could buy was that which was sold by Magnolia Liquor Company?

A. No, no, they didn't say that.

Q. They didn't tell you that the only blended whiskey that you could sell, the only gin that you could sell was Seagram's?

A. No, they didn't tell me that.

Q. They didn't tell you that you must purchase any specific quantity of either blended whiskey or gins in order to carry their brand?

A. Well, like I said before, he said "If you buy a case;" he didn't tell me to buy it. He just said, "If you buy a case of gin, you can get a case of V. O."

123 Q. In other words, on this single, isolated occasion, a Mr. Goodman said that if you bought a case of gin you could get a case of V. O.?

A. Yes.

Q. Mr. Goodman was not the man who regularly served your account, was he?

A. No.

Q. Mr. Arsaga was the man who served your account?

A. Yes.

Q. You had never seen Mr. Goodman before?

A. That was the first time. I have seen him since.

Q. During this period of time, Mr. New, I believe you told me you had four or five different brands of blended whisky and several brands of gin?

A. Yes. Well, I had some bonded whisky too, just say each bottle. Like I say, I never carried much whisky stock; maybe each bottle was half full.

Q. Well, as a result then, Mr. New, of the purchase that you have described to us, this single isolated case of purchase that you made through Mr. Goodman, you didn't then regard yourself as an exclusive outlet for Magnolia products, did you? In other words, you didn't regard that you could only handle Magnolia products at your place?

A. No, no.

Q. Mr. Steeg has attempted to isolate the case of Mr. Goodman's call on you. Who was the first person to call on you on behalf of Magnolia Liquors after you bought the place in January 1951?

A. I think it was Mr. Arsaga, I think.

Q. Well, now, by way of refreshing your recollection, didn't he tell you on that occasion that he couldn't let you have four bottles of V. O., but probably might let you have two?

A. Yes, that is possible.

Q. How many bottles did you get, four or two?

A. I got two.

ANTHONY J. SINOPOLIS was called as a witness on behalf of the Government and having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Milam:

Q. Will you take the stand, Mr. Sinopolis, please, sir.

Just have a seat.

What is your name, sir?

A. Tony J. Sinopolis.

Q. What business are you in, if any, Mr. Sinopolis?

A. In the restaurant and bar.

Q. Where is your place located?

A. 733 Iberville Street.

Q. Is that right next door to the La Louisiana?

A. Yes, that's right.

Q. You have a bar there, do you?

A. That's right, yes, sir.

Q. I mean a bar where drinks are served. I'm not talking about an oyster bar.

A. That's right. And an oyster bar.

Q. You do have an oyster bar, too, though, I believe?

A. Yes.

Q. Did you buy any merchandise from Magnolia Liquor Company, we'll say about a year, year and a half ago?

125 A. Yes, sir.

Q. Are you still buying from them?

A. No, sir, I haven't bought anything in about over a year; about a year, sir.

* * * * *

Q. Why did you stop buying from them, Mr. Sinopolis?

A. Well, I sell a lot of V. O., and I wanted some more V. O., they told me I couldn't get any more. And I asked them why, and they told me—

Mr. Steeg:

Will you speak a little louder. I am sorry, I can't hear you.

A. (continuing) I wanted some more V. O., and then they told me I couldn't get any more V. O., that they didn't have any more. And so I kept buying from them and I finally just told them I had to have more V. O. So they told me if I take some more gin they'd give me more V. O., and I told the salesman, I couldn't handle any more gin.

Q. Do you know what salesman you were talking with?

A. No, sir, I don't know his name.

Q. Did you talk to more than one person about that particular matter?

A. Yes, sir.

Q. Do you know who the second person you talked to was?

A. No, sir, I don't.

Q. Do you know his position with the firm, if any?

A. Well, the salesman, when he came back the second time, I told him. He brought this other gentleman in. I didn't know who he was. His name. He told me if I take more Seagram 7, that he'd give me more Seagram V. O.

Q. Do you know whether or not he was employed by Magnolia or by Seagram?

A. That I don't know, sir.

Q. You don't know the name of the salesman that called on you?

A. No, sir, I sure don't.

Q. Could you describe him to us?

A. Well, the first gentleman was a small, small fellow; very small, and the name I don't know. And the second gentleman, he was an elderly fellow; kind of a little on the heavy side.

Q. Mr. Sinopolis, could this be one of the gentlemen who called on you?

A. No, sir.

Mr. Steeg:

Let the record show that Mr. Weber, employee of Seagram's Distilleries was called into the room.

By Mr. Milam:

Q. Have you retained any of the invoices for the liquors that you bought from Magnolia?

A. Yes, sir.

Q. They are available?

A. Yes, sir.

Q. Here are some invoices supplied by the Magnolia, that is copies of invoices, could you say whether that apparently represents merchandise that you got from Magnolia?

A. Well, it is so long ago, I wouldn't remember that far back.

Q. That is the correct name and address of your place, is it not?

127 A. That's right, yes, sir.

Q. The salesman on those invoices is designated as what number?

A. Number two, sir.

Q. Number two, did you say?

A. Looks like that, sir.

Mr. Milam:

That is all, sir.

Mr. Steeg:

I'd like to ask you a few questions, Mr. Sinopolis.

Cross Examination.

By Mr. Steeg:

Q. We have here three invoices which you've just identified as relating to your sales from Magnolia Liquor Company, for December and January 1950. Our invoice No. 9501, shows purchase of one case of Seagram's 7 Crown. Your invoice No. 9965 shows, dated December 23rd, 1950, shows one case of Seagram's 7 Crown. Our invoice No. 2872, dated January 10, 1951, shows three bottles of Hennessy 3 Star, and one bottle of Johnny Walker Black Label.

Were these the only purchases you made from Magnolia during this period?

A. Now, that I wouldn't know, sir, but I have the bills.

Q. None of these were purchases of gin, were they?

A. No, sir.

Q. Do you remember whether or not you bought any gin from Magnolia during that period?

A. That I don't believe I did.

Q. You don't believe you did?

A. No, sir, I don't believe I bought any gin.

128 Q. You don't believe you did?

A. No, sir, I don't believe I bought any gin.

Q. Now as I understand your testimony, you are getting V. O. and you wanted an increased quantity?

A. That's right, sir.

Q. And when you asked for the increased quantity, that

is when you had this discussion, and dispute with the salesman?

A. That's right.

Q. But you had been purchasing V. O. prior to that?

A. Well, very little, but I had.

Q. Now why did you buy this 7 Crown, Mr. Sinopolis?

A. Because I had a demand for it.

Q. You had a demand for the 7 Crown?

A. That's right.

Q. 7 Crown was one of your best sellers, wasn't it?

A. That's right.

Q. You are the proprietor of your business?

A. My brother and I, yes, sir.

Q. What is that?

A. My brother and I.

Q. Your brother and you. You made the purchases, however?

A. That's right.

Q. Did anyone from Magnolia ever tell you that you had to purchase all of your blended whiskey and all of your gin from them?

A. No, not all; no.

Q. Did they ever tell you that you could only handle Seagram's blended whiskey, and Seagram's gin?

A. No.

Q. As a result of these two purchases of Seagram's 7 Crown, during 1950, did you consider that you were an exclusive outlet for Magnolia Liquor products?

129 A. No, definitely.

Q. You never considered yourself at any time under the domination or control of Magnolia? You've always run your own business yourself, isn't that correct?

A. Yes, sir.

Q. Do you know the owners of Magnolia Liquor Company?

A. No, sir; I don't.

Q. Would you know them if you saw them?

A. I don't believe.

Q. Do you know whether they're in the Courtroom now?

A. No, sir, I don't.

133 BURRELL WEBER, was called as a witness on behalf of the Government and having been previously duly sworn, testified as follows:

Direct Examination.

By Mr. Milam:

Q. What is your name, sir?

A. Burrell Weber.

Q. What is your business, if any?

A. I beg your pardon?

Q. What is your business, if any?

A. I am working for Seagram's Distillers Corporation.

Q. What are your duties?

A. Missionary man.

Q. Will you describe a little more in detail. I don't know much about missionaries.

A. That is more or less public relations, good will, promoting the sales of Seagram—assisting in sales of Seagram products.

Q. In other words, you go around with the salesmen and help them make sales?

A. That's right.

Q. Sometimes you go without the salesmen, don't you, and do a certain amount of promotion?

A. Yes, sir.

Q. Do you know Sam Lopiccolo?

A. Yes, sir.

Q. Did you ever call on him?

A. Yes, sir.

Q. Did you turn in an order to the Magnolia that you received from Mr. Lopiccolo? At any time?

A. Yes, sir.

134 Q. Who was the regular salesman of that route, if you know, at that time? Could it have been Mr. Brown?

A. I believe so.

Q. Do you know a Mr. Charles that works for the Magnolia people?

A. Yes, sir.

Q. Have you been making rounds with him, too?

A. Yes, sir.

Mr. Milam:

He's your witness.

Mr. Morrisson:

No questions.

MANFRED WILMER was called as a witness on behalf of the Permittee, and having been first duly sworn, testified as follows:

Q. Would you please state your name?

A. Manfred Wilmer.

Q. What position do you have with Magnolia Liquor Company?

A. Vice-president and sales manager.

Q. How long have you occupied those positions?

A. Since the fall of 1949.

Hearing Examiner Rennolds:

Speak up a little bit, will you, Mr. Wilmer.

A. Since the fall of 1949.

135 Q. Mr. Wilmer, during the months of December, 1950, and January, February and March of 1951, did you, your house, sell Seagram's V. O. Canadian blended whisky?

A. Yes, sir, we did.

Q. Could you get all of that whisky that you could sell?

A. No, sir.

Q. What was the policy, what was your policy as sales manager with respect to the distribution of V. O. among the retailers of the territory that Magnolia served?

A. Well, sir, recognizing the fact that we couldn't get all that we could sell, I would say that our central objective was to distribute the amount that we had in as fair and equitable a manner as possible, looking toward achieving as complete a distribution as we could possibly do in our market.

Q. Could you give all of your customers as much V. O. as they wanted?

A. No, sir.

Q. Because your supply was limited?

A. Yes, sir.

Hearing Examiner Rennolds:

Over what period of time?

Mr. Morrison:

I'll qualify that question.

Mr. Morrison:

Q. During the four-months period I've described?

A. Yes, sir. My answer would remain the same.

Q. Did you require retail customers to buy other products in order to get V. O.?

A. No, sir.

136 Q. Did you sell V. O. to customers without their buying at the same time other of your products?

A. Yes, sir.

Q. What is your policy with respect to selling other products, other brands handled by your house?

A. Well, we tried to sell as much of everything as we can, sir.

Q. You employ salesmen for that purpose, don't you?

A. Certainly.

Q. Would you say that it was your desire as sales manager to get as much of all of these various lines which you have described in the twenty-five or twenty-six hundred outlets that you could?

A. Yes, sir, as far as we could. That was our objective.

Q. During that period did you meet competition from other wholesalers who had the same objective with respect to their lines?

A. Quite naturally, yes, sir. We were all trying to do the same thing.

Q. Now, how many other wholesalers are there selling in the area that you served?

A. Quite a number, sir. There were, at that time, I would say ten or more here in New Orleans, and there were an additional number who had either independent houses or branches in Baton Rouge.

Q. They were Louisiana wholesalers, however?

A. Yes.

Q. As sales manager, do you try to keep in touch with the volume of 7 Crown that you sell?

A. Yes, sir.

137 Q. With respect to the four-month period I described what would you say is the sales position of 7 Crown in this market?

A. During that period, we were far and away the number one blended whisky in the market, sir.

Q. Far and away the number one brand?

A. Yes, sir.

Q. Mr. Wilmer, a retailer by the name of Richard Gillen has testified that he purchased a hundred and twenty-five cases of Seagram's 7 Crown whisky from Magnolia in the end of December 1950. Did you have any personal connection with that sale?

A. Yes, sir.

Q. Would you tell us how that sale was made?

A. Mr. Morrison, we were trying at that time to exceed our sales figures for the previous year. So we went to see Mr. Gillen. I went to see him with the salesman who called on the account. We offered him a discount on the merchandise if he would—if he would buy a quantity that we were offering in order to qualify for the discount, and he bought it.

Q. How much discount did you offer him?

A. I think it was two dollars and fifty cents a case.

Q. That was a regular discount available to all retailers?

A. It was a discount which we had put on for the three-day period there toward the end of the year, which was available to everyone.

Q. I'll put it this way: was that discount offered to people who bought hundred case lots or more?

A. Yes, sir.

Q. Had you ever offered that discount to Mr. Gillen before or since?

A. No, sir.

138 Q. Having offering him the discount, did you have any difficulty in making the sale?

A. No, sir.

Q. Now, do you recall a purchase of ten cases of gin by Mr. Gillen?

A. Yes, sir, that was part of the same sale.

Q. Part of the same sale?

A. He bought it at the same time.

Q. Did you give him a discount on the gin?

A. Yes, sir.

Q. Do you recall how much?

A. I think it was the same amount.

Q. Two and a half a case?

A. Yes, sir.

Q. And having given him this discount on the gin, did you have any difficulty in making the sale of the gin to him?

A. No, sir.

Q. Subsequently, Mr. Gillen bought some V. O. from Magnolia, did he not?

A. I believe he did, yes, sir.

Q. In those subsequent sales he bought the V. O. without purchasing any other products, didn't he?

A. I think that is correct.

Q. Didn't he?

A. Yes, sir.

Mr. Milam:

Mr. Hearing Examiner, if Your Honor please, I still object to the leading form of the question. Mr. Morrison has been practicing for some many, many years.

Hearing Examiner Rennolds:

I don't think you should lead the witness, Mr. Morrison.

139 Mr. Morrison:

Well, an objection to a question as being leading is one that is very seldom raised in an informal hearing like this. We're trying to get to the meat of it and get through with it.

Mr. Morrison:

Q. Mr. Wilmer, Mr. Gillen testified that he bought the 125 cases of Seagram's 7 Crown and 10 cases of gin on representations that he could get the quantity of V. O. because of that purchase. Now, was there anything of that nature discussed?

A. No, sir.

Q. What was the criteria upon which you based your distribution? How did you decide whether a man should get one case or two cases, one bottle or two bottles?

A. Well, sir, in the first place, we had always to be governed by the limitations of supply. That is, during this period to which you have reference, we didn't always have Seagram's V. O. in stock. That was one consideration. Then, when we did have it, we had to bear in mind how much we had.

In deciding, given granted that we had the merchandise on hand, and deciding how much an individual customer would get, we took into consideration how much he had on hand; how much he needed; what his sales of that item had been in the past; what his buying pattern had been since we've been in business, or since we've been doing business with him, and we tried, as best we could, as fairly as we could, considering his needs in the present, and his purchases in the past, his sales in the past, and, of course, balanced against the needs of our
140 other customers, we tried to come to a fair and equitable determination.

Q. What do you mean by his "Pattern of purchases?"

A. I mean by his pattern of purchases, sir, the amounts of that type of whisky that he had used in the past.

Q. Suppose he had never used it before, how much would you give him?

A. If a man had never used it before, or wanted to use it, and if we had it available, we would try to see that the product was represented in his place, sir.

Q. Upon what condition?

A. No condition, except he paid for it.

Q. You did have a distribution pattern on the V. O., didn't you?

A. I'm not quite sure I understand what you mean by that, sir.

Q. Well, whenever you had it in stock, of course, you didn't have to worry about it if you didn't have it?

A. Yes, sir.

Q. Whenever you had it in stock, you did apportion it out to various customers, according to some sort of a scheme or design, a plan, didn't you?

A. No, sir, I don't think that would be—that would be the best way to put it, sir.

Q. Didn't you just testify that you tried to distribute it among your customers fairly and equitably?

A. Yes, sir.

Q. Well, then, in order to distribute it fairly and equitably, wouldn't you have to have some sort of a plan or design or purpose—

A. Well, the basic purpose, the basis purpose, sir, was to achieve as broad a possible distribution. That was our basic purpose.

Now, given that basic purpose, as I testified earlier it would depend on the retailer's shelf inventory at the time we were selling him V. O.; depend upon how much he had on hand; how much he needed; and how much he had been able to sell, and use in the past. Again, balanced off against the needs of our other customers.

Q. All right. Now, you had a purpose?

A. Yes, sir.

Q. All right. Now as the sales manager, in order to achieve your purpose, you would naturally develop some plan, would you not?

A. Well, I think—I think I've already testified, sir, as to what—as to what we tried to do.

Q. Well, you did have a plan of distribution then?

A. We had the plan that I testified to, yes, sir. I mean, I don't know—I don't quite understand. I am trying to be as helpful as I can, sir. I mean, I didn't have a formula worked out which said a, b, c, and d, all the way down the line, for each of these 2500 accounts, no, sir. But I had the general effect of what I had given you, plus the other considerations which we gave weight to.

Q. How do you explain the fact that a number of your sales invoices show that certain customers received the same proportionate amounts of V. O. and gin as other customers?

Mr. Morrison:

Object to that, Mr. Examiner, because he's going into a field without showing that the witness himself was a party to any particular sale.

Mr. Milam:

I'm talking about these that have been testified here about here in the Courtroom.

Hearing Examiner Rennolds:

Read the question, please.

(Question read back.)

142 Hearing Examiner Rennolds:

I think that is a proper question. It is on cross examination.

Mr. Morrison:

Well, I think he should call the witness's attention to the testimony of the Government witnesses, and tie his question to those transactions. I object to the question as being far too general, and covering a territory that this witness couldn't have had participation in.

Hearing Examiner Rennolds:

He's on cross examination. I'll overrule the objection.

Mr. Morrison:

Exception.

A. Will you—I wonder if you would mind stating the question again for me, or having the stenographer read it so I can get it clearly.

(Question read back.)

A. Well, sir, I don't know whether that is a fact or not, because I haven't seen the invoices that Mr. Milam has reference to. I can—if such a situation does exist, then it can only be that the customers bought those amounts, ordered them.

By Mr. Milam:

Q. Could you explain why the customer would order those amounts in the same proportions?

A. I would assume, sir, because he did need the gin, and wanted to order it.

143 Q. You don't think that all of your customers would have the same needs, do you?

A. Very frequently, sir. It is surprising how frequently we get—we get orders which are similar, the same customer may often give us the same orders, week after week after week, yes, sir. It happens very often in our business.

Q. Well, would you say that Mr. Gillen would require the same proportionate amounts of V. O. and gin as Mr. Bing Crosby would?

A. I don't know, sir. I don't—I don't think I can answer

that question one way or the other, sir. There's quite a difference in the volume of the two accounts, the total volume; but as to the proportion of that volume, as to the various items that they carry, and most of them carry hundreds of items, I don't think I'm competent to testify.

Q. And can you explain why in your distribution system of the V. O. that you frequently gave your customers a case of V. O. when they bought a case of gin?

A. If I gave a customer a case of V. O., sir, it was because we thought that he needed it, needed the V. O., and we had it available for him.

Q. You did call on Mr. Gillen?

A. Yes, sir.

Q. Can you explain why Mr. Gillen ordered a case of Johnny Walker Scotch, and a case of cordials?

A. I didn't call on Mr. Gillen in connection with that sale, sir. I called on him in connection with one sale, which has previously testified to. I couldn't answer that question.

Q. Well, did you make the sale when he ordered five cases of Johnny Walker?

A. No, sir.

Q. And five cases of vermouth?

144 A. No, sir.

Q. Did you make the sale when he ordered 60 cases of Seagram's 7 Crown, and 12 cases of Seagram's V. O.?

A. No, sir.

Mr. Morrisson:

No testimony in the record on that sale.

Q. Now, did you take the order when Mr. Gillen bought some gin?

A. I was present, sir, when Mr. Gillen bought ten cases of gin, and I believe it was 125 cases of 7 Crown, if that is the transaction you have reference to.

Q. That is the time you gave him the discount?

A. Yes, sir.

Q. You were there at that time?

A. Yes, sir.

Q. What did he order on that occasion?

A. I believe, sir, it was ten cases of Seagram's gin and 125 cases of 7 Crown.

Q. Did he order any V. O.?

A. No, sir.

Q. Did you promise him any V. O.?

A. No, sir.

Q. You didn't promise to let him have 12 cases of Seagram's Canadian V. O. if he'd take that order, that proposition that you made him?

A. No, sir.

Q. He did order the gin?

A. Yes, sir.

Q. He got the gin?

A. Yes, sir.

Q. Naturally, if he hadn't bought your gin, he'd have had to buy someone else's, would he not? If he needed it?

A. I doubt—

145 Mr. Morrison:

Wait a moment. Object to that conclusion. Entirely improper. Bear in mind, we have had witnesses testify here that they've had stuff in inventory, and sometimes, they didn't need things, but they bought them anyway to build up their inventory. This goes into the realm of too much speculation.

Hearing Examiner Rennolds:

I don't think the witness should speculate as to what the customer would have done. He should state what he knows, state the facts that he knows. And I don't see how he would know what someone would buy.

Mr. Milam:

I wouldn't press the point. I'll restate the question.

By Mr. Milam:

Q. Were there other gins of the same character available to Mr. Gillen at that time in New Orleans?

A. No, sir, there wasn't.

Q. In other words, there's no gin—I'm going to get in my selling pitch here.

Mr. Morrison:

You are talking to a salesman now.

Q. Could he have purchased Gordon's Gin?

A. I assume so, yes, sir.

Q. Is that manufactured in Louisiana?

A. Gordon's Gin?

Q. Yes, sir.

A. No, sir.

Q. Could he have bought Gilbey's Gin?

A. I assume he could have, and did.

146 Q. Is that manufactured in Louisiana?

A. I don't believe it is, no, sir.

Q. Do you know Mr. Gus Argy?

A. I think I met Mr. Argy once or twice, sir.

Q. Did you call at his place of business?

A. Yes, I've met him in his place of business.

Q. Where was his place of business?

A. On University Place.

Q. Did he ever give you an order over the telephone?

A. I don't remember if he did, sir. To the best of my knowledge the answer would have to be no.

Q. Are you sometimes known as Wilmer?

A. Yes, sir, that is my surname.

Q. Don't you recall on several occasions talking to Mr. Argy on the telephone?

A. I don't remember speaking to him on the telephone at all, sir. I've met him once or twice in his place of business, but I couldn't honestly say that I remember speaking to him on the phone at all.

Q. Do you remember his calling in and ordering and you told him that since it was Saturday, he'd have to come and pick it up?

A. No, sir, I don't remember that either.

Q. Do you recall telling him that in order to get V. O., he'd have to buy gin?

A. No, sir.

Q. Do you know whether Mr. Argy stocked any other brand of gin besides Seagram?

A. I don't know from my own knowledge. I would imagine he must have. I don't know.

Q. Well you have been in his place, haven't you?

A. Yes, sir.

Q. Did you see any gin there other than your own?

A. Yes, on the one occasion I was there, yes, sir.

147 Mr. Milam:

That is all, sir.

Q. Do you have a salesman named Goodman?

A. No, sir.

Q. Do you know a man named Goodman?

A. Yes, sir.

Q. Do you know who he works for?

A. Yes, sir.

Q. Who?

A. There's a man named Goodman who works for Seagram's.

Q. Did he ever turn any orders in to Magnolia Retailers?

A. I have no personal recollection of it, sir, but some of the Seagram men do turn in orders from time to time, and it is possible he might have.

Q. And if they do, you fill them, don't you?

A. Yes, sir.

Q. If you have the goods?

A. If we have the merchandise, we fill the orders.

Q. Is there a Seagram man named Weber?

A. Yes, sir.

Q. He doesn't work for Magnolia, does he?

A. No, sir.

Q. Did he on occasions turn in orders, which he'd take from retailers, turn them in to Magnolia?

A. Yes, sir.

Q. And you fill them if you have the goods?

A. Yes, sir, if we have the goods available.

Q. Now, in those instances were you advised of any representations that Weber or Goodman may or may not have made to the retailer in order to get the order?

148 A. I don't know of any representations that they have made, sir.

Q. In other words, you took the order?

A. Other than to stress the quality of their merchandise.

Q. In other words, you took the order and filled it, is that right?

A. Yes, sir.

Mr. Morrison:

That is all.

Re-Cross Examination.

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SIMON SCHLENKER, JR., called as a witness on behalf of the Permittee, and having been first duly sworn, testified as follows:

Hearing Examiner Rennolds:

Have a seat, please.

Direct Examination.

By Mr. Morrison:

Q. Will you state your name, please?

A. Simon Schlenker, Jr.

Q. Are you in the liquor business?

A. Yes.

Q. What concern are you connected with?

A. F. Strauss & Son, Incorporated, of New Orleans.

Q. Is that a wholesale liquor dealer?

A. That's right, wholesale.

149 Q. What is your position with F. Strauss, Incorporated?

A. President of F. Strauss & Son, Incorporated, New Orleans.

Q. What brands of gin do you handle?

A. Gilbey's gin.

Q. Now, I'm going to ask you some questions, Mr. Schlenker, which will relate to the periods December 1, 1950, to March 31, 1951, and I'll not repeat that series of dates each time, but let us understand that is what I'm talking about.

The Government has offered evidence in this case that Magnolia Liquor Company sold six cases of gin to Jack's Inn, operated by Sam Lopiccolo; and they sold a half of a case of gin to the Front & Society Bar; and they sold two cases of gin to Bing Crosby's and two and a half cases to Gus Argy who ran Argy's Place. I don't suppose you were aware of those things?

A. No, I wouldn't have any way of being aware.

Q. The aggregate of those sales is 12 cases of gin. Can you tell us whether or not the sale of those 12 cases by Magnolia caused you to purchase any more—any less Gilbey's gin in the period in question than you would have purchased anyway?

Mr. Milam:

Object.

A. As far as I could see, I don't know how it could affect my purchases of gin, even if I would have been able to sell those 12, it wouldn't have affected my purchases of gin.

Q. Can you explain that answer a little more fully? Why it wouldn't?

150 A. Well, my own operation here, our gin sales are up, so I don't know that that had any adverse effect on our sales of gin. As our sales for gin for the year 1951 were higher than they were in 1950, I don't know why that particular thing would hurt my sales of gin. I can't understand why it would.

Q. And if your sales are up, the orders from your suppliers were up, were they not?

A. They would have to be because our sales of gin were up in 1951, over 1950, approximately 27 percent, and required additional purchases to have that much gin.

Q. Now, do you handle a blend of whiskey competitive to Seven Crown?

A. We have several blended whiskies, yes, in the general price range; yes, sir.

Q. Can you name the brands?

A. We have Sunny Brook blend, Bourbon Deluxe blend, both of which are in that price range, and we have a cheaper blend also called P. M.

Q. Sunny Brook and Bourbon Deluxe and P. M. are all produced by National Distillers, I believe?

A. That is correct.

Q. And you buy them from out of the State of Louisiana?

A. Yes, sir.

Q. Tell us, if you can, what your position, with respect to sales, was during this period on those three brands of blended whiskey.

A. Well, on the over-all picture, our sales on our blended whiskey in 1951 were higher than they were in 1950.

Q. So you bought more of them from your supplier?

A. Yes, sir.

Mr. Morrisson:

Take the witness.

By Mr. Milam:

Q. Isn't your gin as good as his?

A. You want to know how I feel? I'm under oath; I think it is better.

Q. All right. Every time he sold a case of gin that beat somebody else out of a sale, didn't it?

A. Well, I guess—I don't know whether it did or not. I am under oath, you know. If anybody else sold a case of gin, it beat somebody else out of the sale of the case of gin. I can't say whether I was beat out of any sales or not because my sales are up 27 percent.

Q. Then you don't know whether the gin he sold adversely affected you or not, do you?

A. I wouldn't swear that it didn't.

MAX L. HASPEL, was called as a witness on behalf of the Permittee and having been first duly sworn, testified as follows:

Q. Will you state your name, please?

A. Max L. Haspel.

Q. Are you in the liquor business?

A. Yes, sir.

Q. With what company?

A. Glazer Wholesale Drug Company, Incorporated, of New Orleans.

Q. Is that concern a wholesale liquor dealer?

A. Yes.

Q. What is your position with him?

152 A. Manager.

Q. I'm going to ask you some questions, Mr. Haspel, which relate to the period of December 1, 1950, to March 31, 1951. I'll not repeat those dates, but let us understand that my questions refer to that period.

The Government has offered evidence that Magnolia Liquor Company made a sale of six cases of gin to Sam Lopiccolo of Jack's Inn, a half case of gin to Front & Society Bar, two cases of gin to Bing Crosby, and two and a half cases of gin to Gus Argy, who operated Argy's Place. Now, I don't suppose you know of those sales, did you?

A. No.

Q. What brand of gin does your company handle?

A. We handle Gordon's and Burton's.

Q. Gordon's and what?

A. Burton's gin. Two different brands.

Q. Is Gordon's gin competitive with Seagram's gin?

A. I wouldn't say it is.

Q. You say you would?

A. I wouldn't say it is.

Q. You wouldn't?

A. No.

Q. Did the fact that Magnolia sold the quantities of gin I have described to you to these retailers affect your purchases of Gordon's gin in the period in question?

A. No, none whatsoever.

Q. Now, speak a little louder.

A. No.

Q. Who produces Gordon's gin?

A. Distillers Company, Limited.

Q. Where are they located?

A. In Linden, New Jersey.

Q. During this period, were your purchases of Gordon's gin up or down with respect to the prior part of 1950?

153 A. Well, we have shown a steady increase. I don't remember the exact figures as far as purchases are concerned, but our gin business has steadily increased.

Q. You mean your sales?

A. Our sales, yes.

Q. Now, Mr. Haspel, if your sales have increased, then of necessity your purchases must have increased?

A. Purchases had to increase, too.

Q. Do you handle a blended whiskey which is in the same competitive class with Seagram's Seven Crown?

A. Yes.

Q. What brands do you have in mind?

A. Well, we have Hunter, in that class, that is about all.

Q. What would you say with respect to your purchases of Hunter from the distillery which produces that whiskey—

A. Well, we have never been a very large purchaser of Hunter, even to this day.

Q. Never have been a very large—

A. No.

Q. Well, did you continue to purchase your requirements of Hunter?

A. Yes.

Q. As you saw them?

A. As we saw them, yes.

154 EVERIST CHARLES, was called as a witness on behalf of the Permittee and having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Morrison:

Q. Will you state your name, please?

A. Everist Charles.

Q. What is your occupation?

A. I'm a salesman.

Q. For whom?

A. Magnolia Liquor Company.

Q. How long have you been a salesman for that company?

A. Oh, about a year and eight months.

Q. Were you a salesman in January of 1951?

A. I was, sir.

Q. Were you likewise a salesman in December 1950?

A. I was, sir.

Q. Did you call on Gus Argy?

A. Yes, sir.

Q. Was that at his place which is known as Argy's Place?

A. That's right, sir.

Q. Did you sell him two cases of gin?

A. I don't remember, sir.

Q. Well, specifically, on January 25th, 1951, did you sell Gus Argy two cases of gin and two cases of V. O.?

A. I don't know, sir. I'd have to see the records.

Q. Do you recall taking an order from Argy on December 30th for a half of gin, a case of V. O., a case of Seven Crown, and a case of Haven Hill whiskey?

A. Well, I took orders from Argy. However, as to the exact date, the amount of anything that I sold, I don't rightly recall.

155 Q. Mr. Charles, I hand you two Magnolia invoices, dated December 30, 1950—

A. Yes, sir.

Q. Does that refresh your memory as to whether or not you took the orders for those cases?

A. Yes, sir, I took the orders.

Q. Do you know why there are two separate invoices?

A. Right offhand, no, sir, I don't. Unless Mr. Argy—no, I don't imagine that would be it either.

Q. Now, on December 30, you took an order for him for a case of Seven Crown?

A. That is correct.

Q. A half a case of gin?

A. That is correct.

Q. A case of Seagram's V. O.?

A. That's correct, sir.

Q. And a case of Heaven Hill bourbon whiskey?

A. Bottled in bond; that is correct, sir.

Q. Bottled in bond. Did you tell Argy that he had to buy any of these three items that are in that sale in order to get the V. O.?

A. No, sir, I didn't.

Q. You'd previously sold him Seven Crown, hadn't you?

A. That's correct, sir.

Q. Had you previously sold him gin?

A. That's correct, sir.

Q. Do you call on Mr. Reba, at the Front & Society Bar?

A. Yes, sir, I did.

Q. Do you recall taking an order from him on January 11, 1951, for six bottles of Seagram's gin and three bottles of V. O.?

156 A. Right offhand, I don't know, sir. May I see the invoice?

Q. I'm sorry, Mr. Charles, I should have asked you about the sale of six bottles of V. O., and six bottles of gin. Mr. Argy spoke such poor English that I couldn't—

Mr. Milam:

I thought your proportions were wrong.

Mr. Morrison:

I couldn't hear what he said.

A. Yes, sir, I took this order.

By Mr. Morrison:

Q. Will you tell us the circumstances under which you took that order from Mr. Reba?

A. No, sir, I couldn't.

Q. Did you tell him he had to buy the gin in order to get the V. O.?

A. No, sir, I didn't.

Q. Do you also call on Mr. Trosatty of Frank's Bar?

A. Yes, sir.

Q. I hand you a Magnolia invoice dated December 27, 1950, and ask you if you can refresh your memory from that?

Q. Did you take that order?

A. I took that order.

Q. That is an order for one case of Seagram's Seven Crown in fifths, a half case—no, a quarter of a case of Seagram's Seven Crown in pints—

A. A half case.

Q. Half case. And a half case of Seven Crown in half pints, right?

A. That is correct.

157 Q. Plus what quantities of Seagram's V. O.?

A. Plus a quarter and a quarter, a half case all told.

Q. Did you tell Mr. Trosatty that he had to buy the V. O. in order to get the Seven Crown in that instance?

A. No, sir, I didn't.

Q. Now, next, apparently a shipment to Frank's Bar on January 17, 1951, and I hand you an invoice on that transaction. Do you recall that sale?

A. Yes, sir, I do.

Q. Did you make it?

A. I did.

Q. What quantities are involved?

A. It is one case of fifths, a quarter case of half pints of Seven Crown, and a quarter case of V. O.

Q. Did you require him to buy the Seven Crown in that instance in order to get the V. O.?

A. No, sir, I didn't.

Q. The next shipment to Frank's Bar seems to be on January 31st, 1951, and I hand you Magnolia invoice covering that. Do you recall that transaction?

A. Yes, sir.

Q. Did you make that sale?

A. Yes, sir, I did.

Q. What quantities are involved?

A. One case of fifths, Seagram's Seven Crown, a quarter case of fifths of Seagram's V. O.

Q. Did you require him to buy the Seven Crown in that instance in order to get the V. O.?

A. No, sir, I didn't.

Q. Did you also solicit Frank Sinopoli, Anthony Sinopoli, at the Paramount Restaurant?

A. Yes, sir, I did.

Q. I believe he testified that he was a big buyer of Seven Crown, is that correct?

A. I'm sorry, sir, I didn't understand you.

158 Q. I believe Mr. Sinopoli testified that Seven Crown was his biggest seller. So far as you know that account, would you say that that was a true statement?

A. Well, I have no way of knowing right offhand, but from his purchases, I'd say it wasn't.

Q. You say it wasn't. Did you have any conversation with him about purchasing of V. O.?

A. Yes, I did.

Q. Isn't it a fact that he requested more V. O. from you than you had available?

A. That's correct, sir.

Mr. Milam:

Leading the witness again.

By Mr. Morrison:

Q. Well, state whether or not he got mad at you.

A. Well, Mr. Sinopoli, I'd only called on him a short time, and Mr. Sinopoli was very demanding in the amount he wanted. It wasn't a question of getting some V. O. for him; it was a question of getting, say, he's ask for a case of V. O., at that time the availability wasn't there.

Q. Did you tell him that?

A. I did, sir.

By Mr. Morrison:

Take the witness:

Cross Examination.

By Mr. Milam:

Q. Where did you have this conversation with Mr. Sinopoli?

A. I imagine it was sometime in—I imagine it was sometime in December, either December or January.

159 Q. 1950? December of 1950 or January of '51?

A. That is correct.

Q. Do you have any way of fixing the date?

A. No, sir, not definitely, unless I were guessing.

Q. Well, would it be within a reasonably short period of time after he placed a previous order?

A. I don't know, sir.

Q. Do you remember what the weather was like?

A. No, sir, I don't.

Q. Do you remember who went with you?

A. Well, I called on Mr. Sinopoli for a period of about a month and a half, I imagine. Now, during that time, you asked me a question outside, about who was with me. I thought it over very carefully. It was either one of four people. I mentioned Weber, Toby; now, Felix has gone with me, and so has Lou Fabricant. So it was either one of the four of those people.

Q. You are unable to say who was with you on this particular occasion?

A. Not definitely so.

Q. Now, what was the conversation that took place between you and Mr. Sinopoli?

A. Well, the conversation was about V. O.

Q. Well, who started the conversation?

A. Mr. Sinopoli.

Q. What did he say?

A. Mr. Sinopoli was very, very demanding in the amount of V. O. he should get, and as I explained to Mr. Sinopoli, the availability wasn't there to give the man the amount of V. O. he wanted.

Q. How much did he want?

A. It might have been a couple of cases, I don't remember right offhand.

Q. Well, did you let him have it?

160 A. At that time we didn't have it, if I remember correctly sir. I don't know.

Q. Well, you know whether he got it or not, don't you?

A. I—I don't believe he did. It wasn't there, if I remember correctly.

Q. Are you sure it wasn't there?

A. That is a question I couldn't answer, sir. That is from a year ago. I don't remember.

Q. I didn't catch your answer, sir. I'm sorry.

A. I said, I don't rightly remember, sir. That was, oh, better than a year ago, and I wouldn't remember right offhand without looking.

Q. And you don't know whether the whiskey was available or not at that time?

A. Well, I couldn't say definitely it was.

Q. What was the final outcome of your conversation?

A. Well, sir, I didn't like Mr. Sinopoli's attitude, and I just discontinued calling on him.

Q. What was said about the Seven Crown?

A. Nothing, if I remember correctly.

Q. Anything said about any gin?

A. No, sir, wasn't.

Q. You say that you didn't require or demand your customers, require or demand of your customers to take a specific amount of either gin or Seagram's Seven Crown, or anything else—

A. That is correct.

Q. (Continuing)—in order for you to let them have a specific quantity or some quantity of Seagram's V. O.?

A. That is correct, sir.

Q. Well, then, tell us, now, Mr. Charles, how you managed to get your customers to take an equal amount of V. O. with an equal amount of gin—

161 A. Well, sir, being a salesman, I try to sell the book. In other words, I try to get a man to take all sizes of all of my merchandise, and how I got him to take, as you mentioned, half and half, or equal sizes, and so forth, I wouldn't know, sir, other than me trying to sell it to him.

Q. I still don't quite understand your reply as being responsive to the question.

Can you explain how it happens that these customers that you have testified about here would take an equal amount of gin, or take an equal amount of gin equal to the amount of V. O. that they took?

A. Well, sir, as I told you, when I approach a customer, I go—

Q. What conversation, if any, took place between you and Mr. Argy?

A. Well, sir, I don't rightly remember. Now, each week I called—well, at that particular time, I was calling on around 270 people, and to tell you what the conversation was at that particular time, I'd be guessing.

Q. Did your sales manager furnish you, during this period of time, with an allocation of Seagram's V. O.? In other words, did he tell you you could have so much?

A. No, sir, he didn't.

Q. Well, why were you trying to discourage giving some customers more or less?

A. Well, sir, when I approached a customer, I took several things in mind on V. O. First was availability, whether we had it or not. Now, frankly, whether we had it one week and we were out of it the other week, I don't know. But I'm just telling you generally how I took V. O. into consideration.

162 First was availability. Second, probably if he needed as much; if he had on his shelves, well, I might not give him as much. Third, why, I based a cue on past performance; in other words, how much he bought from me in the past.

Q. How much what he bought from you in the past?

A. Beg your pardon?

Q. How much of what he had bought from you in the past?

A. Merchandise in general.

Q. Merchandise in general?

A. That's right.

Q. Then you have on occasion had V. O. dependent to some degree on how much merchandise a man has bought from you in the past, is that correct?

A. No, sir, that is not correct.

Mr. Morrison:

Wait a moment.

By Mr. Milam:

Q. Didn't you just say that you took into consideration the amount of merchandise that he had bought from you in the past?

A. I said that. That is correct.

Q. Is that the basis upon which you allocated him his V. O.?

A. That is the basis that I allocated V. O., on past performance, that is correct.

Q. Merchandise he bought from you?

A. And the other two considerations also.

Q. What were they?

A. Just as I mentioned, availability, and how much V. O. he might have had on hand at that particular time.

Q. You didn't control the availability, did you?

163 A. I did not control the availability. No.

Q. You were out to sell merchandise, weren't you?

A. That is correct, sir.

Q. All right, if a man wanted five cases of V. O., why would you hold him down to two cases, or three cases, when you didn't fix the availability, and didn't of your own knowledge know whether it was available or not?

A. Well, sir, here's the thing: I called on, as I told you, 270 people, and to give one man all of a scarce merchandise would work in jeopardy to my other customers, and I had to worry about those people—in other words, I had to worry about those people that were going to give me a livelihood 365 days out of a year, and not the man that was going to make that sale on that day for me.

Q. Yes, but you were working on a commission, I presume?

A. That is correct.

Q. All right, and you were out to sell merchandise, and selling on a commission, and a man wanted to order five cases, why didn't you order it and let the house decide as to the availability of it?

A. Well, sir, it is a matter of, shall I say—Well, when you sell, you have to keep good public relations with all of your customers, and for one man to get five cases, and a man who has kept me in business 365 days of the year to get none, I think that would be poor salesmanship, don't you think so?

Q. Then you were taking it upon yourself to make the allocations of V. O. whiskey?

A. I took it upon myself to try to make that which I had an equitable distribution.

Q. Were you allotted a quota?

A. No.

Q. What do you mean that which you had?

164 A. The V. O. on hand, I should say. As I told you, everything was worked on availability, what the man had, and on his past performance. And to actually give a man five cases of V. O., it would work a jeopardy to the rest of my people. So I had to safeguard myself by giving, or trying to give what little V. O., or what we might have had on hand, an equitable distribution.

Q. All sales are dependent upon availability, are they not?

A. All sales are dependent upon availability, that is correct.

Q. You can't sell anything that you don't have very well, can you?

A. That is true, sir.

Q. Then why not give them all the maximum amount that they said they wanted and let the house determine whether it was available or not?

A. Well, sir, that I don't know.

Q. Would that cause any commotion among your customers?

A. Yes, sir, it would.

Q. If you gave each one of them everything he asked for?

A. It would.

Q. Why?

A. Well, I'm only one salesman in 19. And for me to sell everything of the scarce merchandise, and nobody could get anything, it wouldn't be equitable to the others.

Q. Couldn't they do the same thing and let the house decide the availability?

A. Where would the scarce merchandise be?

Q. It just wouldn't be delivered, I presume, if they didn't have it.

A. That is right, sir, and it happened in many a case.

165 Q. Well, but why did you take it upon yourself to determine the availability by holding these people down, when the house could decide that, knowing how much merchandise they had in the warehouse?

A. That I couldn't answer, sir.

Q. You don't—

A. I don't know why I might have done it a year ago. You see, today I might have a different attitude, but a year ago, I don't know what I would have done.

Q. I'm not talking about today. I'm talking about around the time in December, 1950, in January and February of 1951. Do you know why you did it then?

A. I don't know.

Q. Were you instructed to do it?

A. No.

Q. Nobody told you to make that sort of a distribution?

A. That's right, sir.

Q. Did the other salesmen follow the same line of procedure that you did?

A. I don't know, sir. I couldn't answer that.

Q. In pressing their orders for V. O.?

A. I don't know. I couldn't answer that.

Q. You are salesman No. 2, aren't you?

A. I was, yes, sir.

Q. You have testified to something concerning an order that Mr. Reba placed. What conversation, if any, did you have with him about that?

A. I don't remember right offhand, sir.

Q. Did you have any conversation with him?

A. Well, sir, when I call on an account, I usually have conversation with the people in the place, but what it was about, I don't know.

166 Q. Probably about whiskey, wasn't it?

A. That's correct, sir. That was my purpose in being there.

Q. Didn't Reba tell you that he didn't want any gin because it was the wintertime and he couldn't sell it?

A. I don't remember the conversation, sir, but I'm sure he didn't.

Q. Well, if you don't remember, how can you be sure that he didn't?

A. I didn't say I was sure. I said that I don't think that the conversation went that way.

Q. You didn't tell him that he had to take some gin in order to get the V. O.?

A. I did not, sir.

Q. Well, didn't you say you don't remember the conversation?

A. I never mentioned that to any customer, so undoubtedly I did not mention it to Mr. Reba.

Q. You are still working for the Magnolia, aren't you?

A. I am

* * * * *

TESTIMONY OF STEPHEN GOLDRING

Q. Will you give us an explanation of your policy with respect to whether or not you try to maintain some inventory of Seagram's V. O. consistent with the amount furnished you by Seagram's?

A. Will you repeat that question, please?

(Question read back.)

A. We try to maintain some inventory on hand as much as possible. By that I mean we did not like to be completely out of an item, and Seagram's, as I stated before, wanted us to keep a 45-day inventory of 7-167 Crown on hand at all times, due to the fact that there might be shortages or strikes, which we've had on numerous occasions, either at the plant or railroad. We tried to keep a 45 inventory—45-day inventory of 7-Crown. With reference to V. O., as I stated, we usually got our previous month's shipment during the month—we usually got out next month's shipment during the month in which we operated, and held a balance on hand so that we knew what we would be able to distribute the following month.

Q. Were you through?

A. Yes.

Q. Is Seagram's V. O. a nationally advertised product?

A. Yes, sir.

Q. Is New Orleans a tourist town?

A. Yes, sir, it is.

Q. Would you say that the sale of liquor at retail in New Orleans is influenced by purchases of out-of-town people?

A. Well, I would definitely say, according to the records, that nationally advertised brands of merchandise is about the only thing that you can sell in any volume today. In fact, it is about the only thing we can sell at all. It is remarkable—

Q. Was Seagram's V. O. a demand item in retail outlets?

A. Well, the remarkable part about it is that it is a demand item. It is one of the highest priced items there is. And there's never enough of it. We just can get enough. I don't know how the public can pay the price of it, but it is a very expensive item, and it is in great demand. We have put out more V. O. ever since the war, and we still don't have enough V. O., because we received some merchandise just yesterday, or the day before yesterday, and for two weeks we've been out of pints and half-pints, and again I repeat, when I say out, I mean we might have a few cases on the floor, but we don't have any to distribute.

Q. Let's take the closing inventory for December, 1950. 935 cases. Mr. Milam thinks that is a big quantity of whisky. Will you give us your concept of that, as a merchant.

A. I will say this, before I answer the question: That 935 cases of some brands might be an exorbitant amount of whisky for brands that are not selling. However, 935 cases, which was our closing inventory on December 1950, was a small amount of V. O., in comparison with what we could use. At that time we had 18 or 19 salesmen, and if we totalled them together, and we told them to go out and freely sell V. O., they would have sold it all in one day. However, we did sell in January 1,472 cases, which even on the basis of distribution that we used, the 935 was only a three weeks' supply, and if we hadn't have gotten 1,800 cases of V. O. in in the month of January, you can readily see that we would have been completely out of merchandise.

Q. How many retailers would you say there are in the New Orleans area?

A. There's approximately, in New Orleans, approximately 1,500, and in our trading area, between 25 and 26 hundred retailers. And we consider, incidentally, V. O. a prestige number.

Q. Now, as a matter of simple arithmetic, I divide that 935 cases up between the 2,600 retailers, and had you given them each a proportionate part, how much would they have gotten—

169 Mr. Milam:

Well, if Your Honor please, he didn't have 900. He got 1,400 more in in December. He had more than 5,000 for December, 1950.

Mr. Morrison:

Let me ask the question. You are talking about closing inventory, and so am I.

Hearing Examiner:

Well, I think you can proceed. He can say, if such was the situation, what in his opinion would have happened. I think the statistics in the record would show what was on hand.

Read the question, please.

(Record read back.)

A. It is only a fraction of a case, but it is impossible to do it that way.

Q. Why?

A. Because you have some very good accounts, some very large users, and some marginal—and some marginal accounts. The history of the industry in New Orleans alone shows close to 20 percent of the retailers' licenses change hand every year. There's one license in the City of New Orleans for every, approximately, 400 men, women and children, and due to the regulation in this state—I hate to say it—but many of them should be out of business.

Q. Well, even if you give each retailer a proportionate part of that closing inventory, nobody would have gotten a full case, is that correct?

A. That is correct.

170 Q. And as a merchant, you take the position that dividing your inventory and selling it out all at once at the end of the month would not be good business policy, is that right?

A. Definitely not. You couldn't operate in a business of our size just by the minute we got in merchandise, disposing of all of it, and then say we're out, because we have too many accounts we must take care of. We must take care of our accounts on the best way that we know how in the line with good merchandising.

Q. Now, would that answer apply equally to the closing inventories on January 31st, with the end of February?

A. In my opinion, closing inventories, opening inventories, has no bearing whatsoever on the sale and availability of the product, because as I explained, we knew what we were going to get in. We didn't know the exact date it was going to get in, but we knew approximately when it was going to be shipped, and we adjusted our sales accordingly.

Q. I'm going to back up just a moment, because I've been furnished with a little handwritten memorandum that I left on your desk yesterday, and with that to assist you, will you give us the dates of receipt of your shipments in the four months that Mr. Milam is inquiring about?

A. On December the 4th we received 2,700 cases. That is December 4, 1950; on December 20, 1950, we received 1,400 cases; on January 2, 1951, we received 1,000 cases; on January 22, 1951, we received 800 cases; on February the 14th, 1951, we received 625 cases; on March 12th we received 750 cases; and on March the 19th we received 1,559 cases. That is the dates of the receipts during the period involved.

171 Q. Can you give us any information as to the position that Seagram's 7-Crown takes as a sales item in your area?

A. I can give it to you both in my area and nationally, because from all published statistics for the last number of years, Seagram's 7-Crown is decidedly the No. 1, not only blended item—blended whisky item—in the United States, but it is the No. 1 seller in the United States by far, both in the United States and in the State of Louisiana. And those are a matter of statistics.

Q. Now, what about your sales of Seagram's 7-Crown?

A. Over a period of years, since rationing went off of merchandise, our sales vary in accordance with the sales in the state, but Seagram's 7-Crown brings in approximately 30 percent—I think right now it might be down to 24 percent—don't hold me for one percent—but approximately 30 percent of all the blended whisky sold in the state of Louisiana.

Q. Mr. Goldring, I believe we have that in the Permittee's Exhibit K, with respect to shipments of three

leading brands of blended whisky into New Orleans, but I'd like to ask you now; since you only deal in a part of the State of Louisiana, whether your sales figures of 7-Crown would put you in relatively the same comparative position with the other two leading brands?

A. Yes, sir, I'm pretty much familiar with this whole state, and I would say that we keep our percentage pretty much in line with the state figures, because if you consider our houses in Louisiana, we know what our competitors do on Seagram—I don't say competitor, he's located in a different territory—and our figures are pretty much in line with the state's total, and that is 1950, according to this record, we did 30.5 percent of the blended whisky, and in 1951, it dropped to 24.2. But as my competitor said yesterday, and some of our witnesses, it is on the increase again. I hope so.

172 Q. What is your position with respect to the sale of Seagram's Gin, and the other two leading sellers, gins?

A. I didn't hear the first part of the question, sir.

(Record read back.)

A. What is our position?

Q. Your sales position?

A. Our sales position varies from three and four. Gordon's Gin and Gilbey's Gin are by far the two leading sellers in this state. Gordon's No. 1, and Gilbey's No. 2. And they do a tremendous amount of the percentage of the gin business. Seagram's Gin at one time was three, and at one time was four, but it was a very poor third or fourth.

Furthermore, what makes our record—cancel that, please. I answered the question.

Q. Does the Seagram's Gin sell at a higher price than Gilbey's or Gordon's?

A. Seagram's Gin is the highest priced gin sold in the market.

Q. Your sales manager yesterday said it was a distinctive gin; do you agree with that statement?

A. We do not sell or try to sell Seagram's Gin as a competitive item to any other white gin, and when I say:

white gin, I mean Gilbey's, Gordon's, Hiram Walker's, Fleischman, or any of those products.

We feel, and we have been told that we have not only a different product, but a better product, and not using sales talk, it is entirely different from the white gins, and it does not even taste the same, look the same, or smell the same.

Q. What is the brand name of Seagram's gin?

A. Seagram's Ancient Bottle Gin. It is a yellow gin, and all the others are white.

173 Q. Mr. Goldring, I believe you understand by now, after hearing testimony throughout this entire case, that the Government charges that you compelled people to buy Seagram's Ancient Bottle Gin, or Seagram's 7-Crown blended whisky in order that those retailers could get Seagram's V. O.

A. No, sir, we did not.

Q. You did not do that?

A. No, sir.

Q. Was that ever a policy of your house?

A. It was never a policy, and I never told it to anyone.

Q. With your sales position on 7-Crown, state whether or not that kind of policy would be necessary?

A. It definitely was not necessary, for the simple reason that the minute 7-Crown went off of rationing, sales skyrocketed, and even with the tremendous amount of 7-Crown we brought out, there were periods when we were out due to the fact that the merchandise did not come in on schedule, or the distillery got behind on orders. It was never our intention to tie any merchandise in. We didn't have to, and we didn't do it. But we tried to conduct our business on a fair and equitable basis.

Q. With respect to your sales position on Seagram's gin, I believe you said that you occupied the third position in most of the period, and the fourth position in one month. State whether or not it was necessary to follow the practices complained of in order to sell your Seagram's gin?

A. We tried to sell gin every month. We still try to sell gin. We try to sell everything in our house. There was no reason for us to force a man to take anything.

Even today I imagine our distribution on Seagram's gin is greater than any other gin, with the exception of Gordon's and Gilby's, and we strive for complete distribution.

174 That is our policy.

Q. There's been testimony about a man named Goodman. Do you have a man by that name in your employ?

A. No, sir, we have not.

Q. Do you know who he is?

A. I do, sir. To the best of my knowledge, he is an employee of Seagram's, and he does not come around our place. I have not seen him in my office in, I can safely say, two years. I don't know when the last time he was there, and the only time I ever see him is when Seagram's has a sales meeting at one of the hotels, or one of their own meetings.

Q. And this man Weber—

A. Weber is a—

Q. Is he an employee of yours?

A. Pardon?

Q. Is he an employee of yours?

A. Weber is not an employee of ours. He is an employee of Seagram's. He comes out to our office quite frequently, and as he stated, he works alone, and he works with our men.

Q. Didn't you testify on direct examination that you knew what merchandise you would get in, and that you adjusted your sales accordingly?

A. I testified that I knew the quantity of V. O. that I was going to receive, yes, sir. I did know how much I was going to receive.

Q. And you did adjust your sales accordingly?

175 A. I proportioned my sales; I fixed my sales—when I say fixed my sales, I mean the amount of V. O. that we were going to distribute in a given month, total cases, approximately, yes. I knew that.

Q. In other words, you put up a quota for your salesmen.

A. No, sir, I did not put up a quota for my salesmen, because I never had dealings with my salesmen directly.

Q. Then how did you apportion your merchandise that

you knew you were going to get accordingly, if you didn't make some proportionate allowance to your various salesmen?

A. Mr. Milam, we knew approximately, and when I say approximately, we knew about how many cases of V. O. we were going to distribute during a given time.

Q. Well then, what did you mean by saying "We adjusted our sales accordingly?"

A. Adjusted our sales?

Q. Yes.

A. I told the sales department approximately, within reason, how many cases of V. O. that they could distribute in the following month. And that was usually done at the first of the month.

Q. You told the sales department how much they could have during the month, is that correct?

A. The same way Seagram's told me.

Q. Oh, Seagram's told you the same thing?

A. I testified, sir, that we worked out how much V. O. we were going to get over a period of time; how much we were going to get in one month.

Q. Did Seagram's tell you how much gin you must take?

A. Seagram's did not tell me how much gin or 7-Crown I could take after it came off of rationing.

176 Q. Now, if you adjusted your sales accordingly, by that I mean according to what you were going to get, how did you arrange your distribution of the V. O. as between your various customers?

A. I think that was explained, sir. First of all, we try for as wide a distribution as possible on as many items as we can sell. However, on such items as you mentioned, such as V. O., and that is a very high-priced item, I'd hate to sell a large quantity of it in a slum area. I would much rather see a quantity of it in the Roosevelt Hotel, or prestige places. So we try to distribute our merchandise on a fair and equitable basis, and still achieve distribution.

Q. Would you say that you didn't sell it in the slum areas?

A. No, sir, I did not make that statement.

Q. The Roosevelt Hotel that you mentioned is a large buyer, is it not?

A. Yes, sir.

Q. They're large buyers of your other products, are they not?

A. Yes, sir.

Q. Would the fact that one of your customers was a large buyer of other articles influence your decision as to whether you would let him have more or less V. O.?

* * * * *

A. First of all, that's a problematical question. Our policy, I repeat, is distribution; sell all of our merchandise, as much as we can. When you talk about influence, I don't know. A good customer buys everything in our line, and I'd be tempted to give him merchandise, if available, and everything, I must state, is based upon
177 availability, and not inventory, knowing how much we have to distribute during a given period.

Q. Then, if a fellow was a good purchaser of other articles, you might let him have a little more V. O., is that right?

A. It could be; it's possible. Not necessarily because—

Q. Well then—

A. Just a minute, sir,—because in the event there is certain places and certain areas that might be very large buyers of 7-Crown, but they don't require much V. O. There's other places that might want nothing but V. O., and tend to hold back other items. I can't speak for the individual account.

Q. Didn't you say, in answer to a question by your counsel, that you tried to distribute the V. O. on a fair and equitable basis?

A. I did.

Q. What was the criterion by which you arrived at a fair and equitable basis?

A. Distribution, location, availability, the type of customer, quantities of merchandise that he purchased, various things, credit factors; everything must be taken into consideration.

Q. The quantity of other articles that he purchased, then, did influence you to some extent?

A. Not necessarily. Not necessarily. We took everything into consideration.

Q. But you did take the quantities of other merchandise that he purchased into your consideration?

A. I said not necessarily, sir.

178 The Witness:

Yes, sir, a good customer did get merchandise. In fact, we gave V. O. to everyone that we thought was entitled to V. O. But I feel that we had the right to sell our merchandise on a merchandising basis, and not on a tie-in basis.

By Mr. Milam:

Q. Well, what was the basis upon which you would feel that a man was or was not entitled to V. O.?

A. I stated to you, Mr. Milam, that I dictated the policy, and the individual accounts were handled by the sales department, and we took in all the various factors that I named; I mean, I'm trying to answer the question as honestly as I possibly can. I don't know what more I can do.

Q. You did dictate the policies?

A. Mr. Woldenburg and myself. We discussed our policies in our houses. He was associated with me; and we told the sales department our policies.

Q. And whatever the sales department did, that was presumably in accordance with your policies?

A. I believe I am responsible for my employees. I mean, that is why we're here today. If that's what you want me to say.

Q. You are. Then, did you have some sort of a sales pattern with respect to the distribution of V. O., did you not?

A. Pattern? I disagree.

Q. Well, call it a plan?

A. Yes, we had a method of distributing more merchandise.

Q. Did you have the same method for all merchandise?

A. When you say "same method—"

179 Q. Yes.

A. I have to deviate a bit. We have a lot of customers who are large users of wine. We have a lot of customers who are large users of one type of merchandise; larger of others. In 2,600 accounts that we service, we have

every type of account you can think of, and you will have that going into the consideration of the sales department.

Q. Did you distribute your wine fairly and equitably, as you say, or on a fair and equitable basis?

A. As far as I'm concerned, I wish they had enough money to buy all the wine we could have bought.

Q. In other words, you don't restrict anybody as to how much wine they could have?

A. Don't restrict anybody except where the demand is greater than the supply. I've been in business to sell merchandise.

* * * * *

Q. I believe you testified a while ago that the sales manager and the sales organization makes the distribution of the V. O. in this fair and equitable manner which you would describe?

A. I testified that we try to distribute our merchandise in a fair and equitable manner.

Q. Didn't you say that your sales manager and your salesmen make the distribution actually?

A. Actually make the distribution?

Q. Yes, whatever distribution is made, they handle those details?

A. The orders cross our sales manager's desk, if that is what you mean. You mean how does—what does he do, or how—you mean—you had better explain that to me, please, just what—

180 Q. Do you or do you not personally say that any individual bar operator would get so much V. O., or will not get so much V. O., or how much V. O. he will get?

A. Me, no, sir.

Q. You don't decide that?

A. Not the individual cases, no, because I mean, my operations are too broad to make that answer.

Q. Now, if you do not make those decisions, or that decision, how do you know whether or not tie-in sales are made?

A. How do I know?

Q. Yes.

A. I cannot testify. I never admitted to tie-in sales were ever made. I say that they were never made.

Q. How can you say they were not made?

A. Based on my policy.

Q. You only know what your policy is, don't you?

A. Sir, I can't tell you what someone else did this morning. I know that you are trying to establish a pattern, and I don't know of anything about a pattern, because in my policy I never issued those instructions, nor did I find a pattern.

Q. If you, as you have testified to, do not prorate the V. O. among the various customers, how can you say of your own knowledge that tie-in sales were not made?

A. I only stated company policies.

Q. Company policy. You are not attempting to say that they were not made? You are simply describing your policy?

A. I'm attempting to say to the best of my knowledge they were not made.

Q. By your answer I presume that you mean to say that so far as you know, none were made?

A. I don't assume anything on that answer. I say to the best of my knowledge they were not made.

181 Q. You'll not attempt to say, as a fact, that they were not made, will you?

A. I cannot state what you or anyone else did. I can only state the facts that I know.

Q. That's right.

A. And the facts are that to my knowledge they were not made.

Q. And you, of course, wouldn't be familiar with the arrangements that some individual salesmen may have made with some customer, would you?

A. Not the individual discussions or anything of that nature, no.

Q. Did you, or your sales department—. I'll put the question this way: Does or does not your sales department designate the amount, particular amount of V. O. that is going to go to a particular customer, and on that question, I'm referring to the four months period involved in this citation?

A. Let me get that question straight. Read it, please.

(Question read back.)

Q. Well, I don't want to lead you, because that is objectionable to Mr. Milam, but does or does not your sales department designate the particular amount of V. O. in this period that goes to a particular customer?

A. Well, I can't—I don't know whether they designate the sales department governs the sales of V. O. to the customers. Now, I can't say exactly what customers are getting what. That is entirely up to the sales department.

Q. That is dependent upon availability of the product?

182 A. Dependent upon all the different factors that I took into consideration.

Q. For all the retail trade, is that right?

A. Yes, sir.

* * * * *

Mr. Morrison:

Let me restate my position: Mr. Milam offered a citation for the purpose of showing notice under the administrative procedure act. You held that it was not admissible for that purpose. This document is offered for the same limited purpose, and by the same reasoning it is not admissible for that limited purpose.

Now, I go further: This document is a stipulation by the District Supervisor that it, itself, would not be used by the Government in any future proceedings. Now, for the first time in my life I'm compelled to call upon the Government to stand by its agreement, and I insist on it.

Hearing Examiner:

Let me look at that again, please, sir.

Mr. Milam:

For the benefit of counsel, I am happy to say that no one is more able, willing, and ready to stand by the Government's commitments than I am.

Hearing Examiner:

I think this document is admissible into evidence. This document, now that the Government agrees not to use that document, there is nothing in there in the form of an admission of liability on the part of the company, or Mr. Goldring.

183 That document does not—it is the same as the order to show cause that's been referred to. That document is not proof of any violation.

Mr. Milam:

No, the Government doesn't contend that it is, Your Honor. It merely contends that Mr. Goldring was put on notice, and that he was notified that the Government was of the opinion that tie-in sales were being made, and for that reason, if Mr. Goldring is as smart as I think he is, a word to the wise should have been sufficient.

By Mr. Milam:

Q. I hand you a document here entitled Stipulation, dated the 6th of August, 1946. Now, we ask—ask you whether or not you signed it?

Mr. Morrison:

We ask that our objection apply to this whole line of questioning. We take exception—we ask that exception be reserved to the ruling, and we ask that the same objection be applied to this line of interrogation.

Hearing Examiner:

Very well. I'll overrule the objection as to this document, and he can question him in connection with it.

FRANCIS B. CARRIAR was called as a witness on behalf of the Government, on rebuttal, and having been previously duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Milam:

Q. What is your name, sir?

A. Francis B. Carriar.

184 Q. Where do you live?

A. 2812 St. Charles, New Orleans, Louisiana.

Q. What is your business or employment?

A. Employed as Special Investigator by the Alcohol and Tobacco Tax Division, Bureau of Internal Revenue, Treasury Department, United States Government.

Q. How long have you been in Government service?

A. Approximately 17½ years.

Q. What is the extent of your education?

A. I've regular high school education; also I have a law degree from Loyola University of the South. I'm admitted to the bar in Louisiana, and Federal Court in Louisiana.

Q. Have you had any occasion in the course of your employment to examine the copies of the 52a's and b's submitted to the District Supervisor of the Alcohol and Tobacco Tax Division, by the Magnolia Liquor Company, Inc.?

A. I have.

Q. Did you examine some of them, or all of them?

A. Do you mean at the present time or previously?

Q. At the present time.

A. At the present time, I do not examine any of them.

Q. You don't examine any of them?

A. Not as of today, no.

Q. Have you, in the past, had occasion to examine them?

A. I have.

Q. Did you examine the ones for the period December 1950 to March 1951?

A. I did.

Q. Did you examine any prior to that time?

A. I did.

Q. Did you examine any subsequent to that time?

A. I did.

185 Q. Did you, in the course of your examinations, discover any discrepancies or irregularities with reference to these 52 records?

Mr. Morrisson:

Are you attempting to prove now, Mr. Milam, some other irregularity than Column 5 or 6?

Mr. Milam:

No, sir.

Q. Did you?

A. Repeat that question, please.

(Record read back.)

A. I discovered what I considered was a discrepancy.

Q. What was the discrepancy?

A. After examining 52 records for four months for Magnolia, the period I mentioned, I did find that they

had sold, according to their records, absolutely no V. O. Canadian whisky.

Q. Did you make any attempt to determine whether they had actually sold any?

A. I did.

Mr. Steeg:

What was that question?

(Record read back.)

Q. How did you determine if they had sold some?

A. It was necessary for me to go to the retail liquor dealers, in the City of New Orleans, and ask to see their invoices. And by comparing—by looking at Magnolia 186 Company invoices, I found that numerous entries which appeared to be domestic spirits were, in fact, Canadian—rather, Seagram's V. O.

Q. When did you first make that discovery, or about when?

A. Approximately February 1, 1951.

Q. Did you or not call on any retailers for the purpose of examining their invoices in connection with this matter?

A. I did.

Q. Did you call on Charles Genard, Carondelet Street—Mr. Morrisson:

Object to that. In the first place, it is beyond the scope of the bill of particulars. In the second place, it is not in rebuttal. In the third place, the entire line of questioning, if sound at all, is merely repetition, and cumulative of the matters covered by the stipulation which we've already filed, which was to the effect that respondent did buy and sell large quantities of Canadian V. O.

A. I did.

Q. From the Examiner's ruling it appears that Genard did purchase a quantity of V. O. In your investigation, did you determine whether or not he had purchased

187 any other article or articles of the Magnolia Liquor Company?

* * * * *

A. On December 21, 1950, on Invoice 4133, he purchased one case of V. O., three cases of Seagram's 7-Crown.

* * * * *

Q. Now, I believe you said that you contacted Mr. Genard, G-e-n-a-r-d, and that you examined his records, and from the examination of his records, and your contact with him, you were able to determine that he purchased what merchandise, if any, on December 21, 1950?

A. He purchased three² cases of 7-Crown, and one-half case of Seagram's V. O., invoice No. 4133, dated 12-21-50.

Q. Did you find any other purchases by him from Magnolia?

A. I have another purchase listed on January 17, 1951, invoice 9141, in which he purchased two and a half cases of 7-Crown, and one-half case of V. O.

Q. Mr. Carriar; during the course of your investigation, did you contact a number of other dealers in addition to Mr. Genard?

A. I did.

Q. Did you make a list of those dealers?

A. I did.

Q. Does that list show their name and address?

A. It does.

Q. Did it show the dates on which they made their purchases?

A. It does.

188 Q. Does it show the invoice number?

A. It does.

Q. Does it show the items that they purchased?

A. It does.

Mr. Milam:

If Your Honor please, in an effort to save time—or perhaps I had better do something else first.

Q. Did you make the same sort of investigation and inquiry on each of these people whose names appear on your list as you did Mr. Genard?

A. I did. Mr. Milam, in this respect there's one thing I'd like to say here, and that is this: I don't say that this is their complete purchases for their period of time. It was only the purchases I was interested in.

Mr. Steeg:

What was that?

The Witness:

These do not necessarily constitute the complete purchases made by these people. This list is the list of purchases that I was interested in.

Mr. Milam:

Now, if Your Honor please, in an effort to save time I'd like to offer that list, and if the defense wants to cross-examine him as to any individual customers, well, then, O. K.

Mr. Steeg:

Of course, if the Court please, we feel that under these circumstances the offering of the entire list is improper.

189 He hasn't pointed out that the information on this document was taken from the invoice. He hasn't pointed out, and we don't believe the document does represent all of the items represented on each of these various invoices. We don't believe, originally, that he has the right to testify as a fact that these items were made, and we repeat the various objections we made to the line of questioning on which the Court and the Hearing Examiner has already ruled.

So we feel that the offering of the list as such is not proper.

Mr. Milam:

The witness, if Your Honor please, has testified that he made the same sort of examination as to all the others that he did into the one that he just testified about. And I don't see any use of taking up all of your time to go into each one of them individually, when he did the same thing, and put down the same results.

Now, if they want to cross-examine him as to any one of those, that is their perfect right to do that, but in order to save going over and over and over—

Hearing Examiner:

I think you should bring out from the witness, Mr. Milam, a little more in detail how he got this document; how he arrived at those figures.

Now, if he picked out, as he says he did, transactions that he was interested in, but not all the transactions between a particular retailer and the permittee—in other words, I think that if the invoices he picked out, if it shows everything that was on that invoice, then I think that is admissible, but if he selected, say five invoices, and then just selected certain items on those five invoices, I don't think it is admissible.

190 By Mr. Milam:

Q. Tell us about that, Mr. Carrier. Did you, in making your list up, omit any items from some invoices, or when you made up your list, did you put the complete invoices in your list, if you know?

A. I wouldn't be in a position to swear that these invoices had or had not more on them than these. I know this appeared on the invoice, and since I was making an investigation of tie-ins, necessarily I did not think it necessary to take more than the information I was interested in.

Q. In other words, if there was wine or something else about which you were not concerned, you wouldn't put it in your memorandum?

A. Correct. The information was gotten by the examination of the retail liquor dealers' records, which were produced for my inspection, and that is where I got the date and the invoice number, were from the invoices of Magnolia Liquor Company, Inc.?

Q. Which items were you particularly interested in?

A. I was particularly interested in Seagram's V. O., Johnny Walker scotch whisky, Cinzano vermouth, Seagram's gin, Seagram's 7-Crown.

Q. Were you interested in creme de menthe?

A. Nuyen's cordials, whatever particular flavor it happened to be.

Hearing Examiner:

Now, the report that you made from those records, does it contain the transactions as to those items you just mentioned?

The Witness:

Yes, sir.

191 Hearing Examiner:

All of those items on each invoice that you used?

The Witness:

Yes, sir. The items that I have listed are the items which appeared to me to be sold in proportions which were, to say the least, coincidence that they should be sold in that particular proportion.

Mr. Steeg:

I'd like to move that that be stricken; if the Court please. I don't think that is responsive.

Mr. Milam:

I firmly believe that there'd be no point in introducing any evidence here about some wines or something that has no connection with the case, even if it was on the invoice. They would be introduced, if the invoices could be introduced, only so far as they related to the items which the Government alleges were not tied in, and not to some extraneous matter to which nobody has any particular interest in at the moment.

Hearing Examiner:

I think the document is along the nature of other documents that's been in evidence, so I will admit the document in evidence.

Mr. Steeg:

Exception.

Mr. Milam:

Will you give it a number, if the Court please?

192 Hearing Examiner:

Government's Exhibit No. 30.

Q. After you finished your examination of the 52 records, did you file any report with your superiors showing that you had determined there was an error on the face of the records relating to Seagram's V. O.?

A. If I didn't make a written report of it, I at least told my supervisor verbally that there was no V. O. show-

ing at all. And then, upon his instructions, I went to the retail liquor dealers and looked at their invoices to see if there was V. O. showing or not.

Q. What were you looking for on the face of those 52 records?

A. I was looking for what might be tie-in sales.

Q. When did you make this examination?

A. Approximately February—some time around February 1, 1951.

Q. When did you go to your District Supervisor with the information concerning the 52 records?

A. Before I completed the check on them. I know that because we were discussing it—we discussed it at the time, that there was no V. O. showing on the records.

Q. When did you complete your examination?

A. I couldn't be sure of that, sir. It was right in that—I started in right immediately after Christmas of 1950, when I got back to work from a vacation, and I suppose—as close as I can recollect, I finished around February 1, February 3rd, somewhere in there.

Q. You knew that Magnolia Liquor Company carried Seagram's V. O.?

A. Yes, sir.

193 Q. There wasn't any doubt about it? You had no doubt about it?

A. No.

Q. When you didn't see any entries of V. O. on the 52 records, did you not know that the commercial records could or would show the disposition of the V. O., and the receipt of the V. O.?

A. Yes.

Q. Under those circumstances, you still made no effort to check the records of Magnolia and determine what those records showed?

A. No, Mr. Steeg. When you are investigating, you don't go to the people and ask them what you want to see, and tell them what you are doing.

Q. Why not?

A. Because it is not good investigative procedure.

Q. In other words, you did not want to give them a warning as to what you found on the 52's?

A. It is not my province to warn anybody, Mr. Steeg. I'm an investigator. And I might say I would be considered quite derelict in my duty if I go and tell the committee what I was doing, would I not?

Q. Did I understand you started examining these records in May 1950?

A. Yes, sir.

Q. Were you looking for tie-in sales at that time?

A. No, sir.

A. At or about that time there were a bunch of bootleggers from North, South Carolina, and West Virginia coming over to New Orleans and buying liquor to transport it back to the dry counties. And I saw some of them subsequent to that date at the Magnolia Company buying liquor. So I checked the 52 records to see what they bought.

Q. Did you find out what they bought?

A. Yes, sir.

Q. How did you find out what they bought? From the commercial invoices?

A. No, from the 52 records.

Q. From the 52 records. Now, as I understand, I think you said you were looking for tie-in sales?

A. Yes, sir, at a subsequent date, as I mentioned, after Christmas in 1950.

Q. After Christmas in 1950. These dealers you named on here are all the dealers you went to?

A. I believe that the dealers on the list, which is a Government exhibit, plus the dealers that were listed by Mr. Milam—I can't rightly say—I think I called on 78 dealers. Now, if that adds up to 78 dealers, that is what I called on.

Q. In order to make this list, you asked the dealers to produce their commercial invoices of purchases from Magnolia?

A. Yes, sir.

Q. And then you selected from this list of invoices, from these various dealers, the invoices that you wanted?

A. Yes, sir.

Q. Were you out trying to determine whether Magnolia Liquor Company was making tie-in sales, or out to prove that Magnolia Liquor Company was making tie-in sales?

Mr. Milam:

We object to that, if Your Honor please. That is not proper questioning.

195 Hearing Examiner:

That is argumentative.

Mr. Milam:

I don't think you can say that the Government officers are generally out to prove something unless—

By Mr. Steeg:

Q. You had asked the dealer to bring in all his invoices?

A. Yes, sir.

Q. And then you selected from these invoices certain ones that you wanted?

A. Yes, sir.

Q. Why did you select those certain ones?

A. Because they seemed to me to follow a pattern, which the rest of them did not have.

Q. In other words, the invoices you picked out followed a pattern which not all of the invoices would have sustained, is that correct?

A. That is correct.

Q. And, therefore, you furnished information and made up this list in order to show a pattern that in your concept meant tie-in sales?

A. No, sir, you misunderstood. As a result of an anonymous phone call that Magnolia was tying V. O. with gin and other products, I went out to determine the truth or falsity of that particular call. Tie-in sales in the past have always, you might say, followed a particular pattern.

It is sometimes not easy to get; sometimes it's very easy. Once sales become repetitious in proportion, you use that to continue the investigation.

Q. So that you picked out isolated invoices from the overall group to determine your pattern?

A. Yes, sir.

196 Q. Did you determine whether the number of purchases, by invoices that you picked out, constituted a

majority of or less than a majority of the transactions?

A. Now, I would not be able to say.

Q. Did you make any effort, in picking these out, to determine whether there were any transactions between these parties which were not tie-in sales?

A. No, because there can be a lot of transactions that might not be tie-in sales; there might be some that are. There may be some that look like they are that are not.

Q. So that you only determined from the face of the record a combination which you thought was a tie-in sale?

A. Correct.

Q. But that may not have been a tie-in sale? It may have been an order placed by the customer?

A. They all were orders placed by the customer.

Q. In other words, they were all orders voluntarily placed by the customer?

A. I do not know.

Q. You don't know?

A. No, sir.

Q. All you know, and all these invoices represent, are isolated transactions from a selected number of retailers, which in your determination constituted some sort of a pattern?

A. Correct.

Q. Is that correct?

A. Yes.

Q. And you made a report of these isolated transactions in the form of this Government exhibit?

A. Correct.

Q. You didn't point out that there were a number of other transactions, possibly as many, and possibly more, that did not substantiate your belief that there were tie-ins, did you?

197 A. There was no need of it.

Q. Why wasn't there a need of it?

A. Well, these people could have gone along—according to their testimony—I've heard it, and for years they could have gone along and done nothing wrong. Therefore, it is possible that there was nothing wrong here. Why point out each and every invoice. Why pick out each and every sale.

Q. As a Government investigator, weren't you only interested in finding out what the facts were?

A. Correct.

Q. And can you determine the true facts from 69 transactions on 18 retailers, after contacting a total of 78 retailers; and you say that that is a true representation of the facts?

A. I could not go out and go through each and every invoice, each and every dealer had, to determine whether or not all of the 5,200 accounts had bought in the same pattern. So I went to those where the 52 records indicated that there were equal amounts of gin and R153 whisky bought. I went to those that showed scotch whiskies.

Q. But you recognized that these, even though they may have indicated a pattern, may not have been tie-in sales?

A. It is possible they were not tie-in sales.

Q. And you recognize that, and though a man purchased in the relation of one to fifteen on several occasions, that there was no necessity of there having been any compulsion of any purchase of one to fifteen, or one to ten, or any other—

A. I was investigating the anonymous phone call that was received by the office, to see if there was any truth or not to the statements made by this caller.

198 Q. And as a result of a single anonymous phone call, and these 28 retailers out of 78, and these specific number of transactions, that is all your report is constituted of?

A. That is correct.

Q. Isn't it generally true that when a retailer purchases, he doesn't only purchase one item, but he purchases the needs he may have for his establishment?

A. I do not know what the retailer does.

Q. In almost all of the invoices that you examined, didn't they contain more than one item?

A. I do not recall.

Q. In almost all of the various invoices that you examined, didn't V. O. and 7-Crown appear on them in some proportions or other?

A. Oftentimes.

Q. Oftentimes. I'm not only referring now, Mr. Carrier, to the invoices that you made up on this list here, but I'm referring to all of the invoices.

A. What do you mean by all?

Q. All of the invoices that you looked at, whether you selected them or not?

A. I do not recall, Mr. Steeg.

Q. Now, were you able to establish your pattern, Mr. Carrier, by picking out one in one invoice for each set of circumstances? Do you understand my question?

A. Repeat it, will you please?

Q. Let me rephrase it. In making out these invoices, did you look at the single invoice to determine whether or not there was a specific proportion that you had in mind?

A. I had no proportion in mind. I made a rough tabulation as I went along, and when I saw that the pattern of gin and V. O. were recurring in obviously equal proportions, I began looking for invoices with that particular proportion on them.

199 Q. Well, if that is so, will you kindly tell me why in the case of J. Maselli, in order to get a specific proportion, you picked invoices on three separate dates, and then picked invoices on four separate dates, and combined these invoices into the sum total in order to reach the pattern that you have on there?

A. Yes, I'll tell you why, Mr. Steeg. Because often it is the case for wholesale liquor dealers to cover tie-in sales by invoices with various articles spread out so that it will not appear as they were ordered at one and the same time.

Q. You didn't know that?

A. I didn't know whether they were or not.

Q. So you picked out specific groups that met the totals in proportion to that you had in mind?

A. That is correct.

Q. You don't even know when, in picking them out, whether you picked them out consecutively, do you?

A. J. Maselli was picked out consecutively. That is the reason I grouped them. The others, I do not believe are in there, because there was no indication of them being in order.

Q. I suggest you keep this in your hand, Mr. Carrier. I have an idea you are going to need it.

Now, will you look at your first item, dated 12, 21, 1950. Invoice No. 4133. It is a purchase of what?

A. Three cases of Seagram's 7-Crown, one-half case of V. O.

Q. Do you know how many purchases Mr. Genard made in the month of December?

A. No, sir.

Q. Did you take out any of the other invoices that Mr. Genard had during the month of December?

A. No, sir.

200 Q. If I told you that on the first day of December Mr. Genard purchased one case of 7-Crown, and nothing else, do you recall seeing any such invoice?

A. I do not.

Q. If I told you that Mr. Genard purchased three cases of Seagram's 7-Crown on December 15th, and no other items, do you remember that invoice?

A. I do not know there was an invoice such as that.

Q. An invoice of one case of 7-Crown alone, and three cases of 7-Crown alone, would have destroyed your pattern, wouldn't it?

A. There is no pattern there. I do not know if there was such invoices.

Q. Assuming that there were, there was no pattern there, was there, if he bought four cases of Seagram's 7-Crown without any accompanying purchase?

A. I don't see what you are getting at, Mr. Steeg.

Q. In other words, to carry this a little bit further, Mr. Carrier, if a retailer on December 1st bought one case of Seagram's 7-Crown, with no accompanying purchases; on December 12th bought—December 5th bought Seagram's 7-Crown in the quantity of three cases without any accompanying purchases; on January 3rd bought two cases without any accompanying purchases; on January 10th bought one case with the accompanying purchase of one case of champagne, that total of eight cases of Seagram's 7-Crown without any accompanying purchases does not represent a tie-in, does it?

A. No, sir, because nobody said that they were using—that they had to buy something else to get Seagram's 7-Crown. We were checking to see if they had to buy anything else to get V. O.

201 Q. So that your sole basis of indicating willfulness on this case is one out of five transactions, where this man bought one-half case of V. O., in the middle of these transactions, and three cases of 7-Crown? Isn't it quite obvious he needed the 7-Crown at all times, and that nothing was sold him more than he needed?

A. I presume he needed the 7-Crown. He might not have ordered it, because I don't know whether he needed anything else or not.

Q. Did you determine that during the month of February 1951, that Mr. Genard purchased five cases of Seagram's 7-Crown, and one-half a case of V. O.?

A. I do not know that, sir.

Q. How many cases do you show on your report, Mr. Carrier?

A. I show one-half case of V. O., and that entry that you mentioned on December 21st, one on January 17th, 1951.

Q. So that if I were to tell you that between December 1st—March 31st, there were 10 transactions between Magnolia Liquor Company and Mr. Genard, you would have no knowledge of that?

A. I would not know whether 10 was correct or not.

Q. You only took cognizance of two transactions?

A. Yes, sir.

Q. You only picked out of the 10 transactions, two transactions?

A. If I recall, Mr. Genard was one of the first people I looked his invoices over, and it was very possible I looked his invoices over long before the 31st of March, so I would not have seen his invoices.

Q. Let's see about Mr. Autin. I believe that you said that this list that you furnished us, Mr. Carrier, showed all of the purchases appearing on that particular invoice, did it not?

202 A. No, sir, I did not.

Q. Oh, it didn't. Did you make a note that the invoice of December the 7th included 7-Crown, V. O., Herbsaint and cordials? Tell me from your list what is supposed to be represented, Mr. Carrier, what sales?

A. The invoice you mentioned, 5620, is three bottles of cordial, and three bottles of V. O.

Q. I show you invoice dated December the 7th, 1950, addressed to St. Charles Tavern, N. P. & I. J. Autin, Invoice No. 5620, which I mark for identification as Permittee's Exhibit Q, and ask you if this is the invoice you are referring to?

A. According to my list, that is the number of the invoice I am referring to.

(The document above referred to was marked for identification as Permittee's Exhibit Q.)

Q. Tell me how you can show tie-in in any possible way or relationship, Mr. Carrier, between three bottles of cordial, and three bottles of V.O., when there are one, two, three, four, five, six, seven items on that invoice, two items of V. O., and five other items?

A. Well, sir, our information was that Nuyen's cordials were being tied. Creme de menthe was one of them, so when I looked over this invoice, I saw three bottles of creme de menthe, and therefore three bottles of Seagram's V. O.

Q. So, therefore, you assumed that that was the tie-in?

A. I didn't assume it was a tie-in, no, sir.

Q. Isn't that—

A. I made a list of the—

Q. Isn't that what you are saying by that list, Mr. Carrier? Isn't that what you are intending to imply by your list?

203 A. All my list shows there, Mr. Steeg, is that this coincidence in this proportion has occurred on many occasions.

Q. You made no attempt in this exhibit which the Government has offered to present the complete and accurate picture of the transactions between the retailer and the wholesaler, is that correct?

A. I try to present the picture as it appears from the standpoint of whether or not it was a tie-in sale.

Q. That is not the question.

Mr. Steeg:

Now, would you read him the question?

(Record read back.)

A. I do not get the question, Mr. Steeg. I'm sorry.

Q. Your exhibit that you have in front of you—

A. Government 30.

Q. Government 30, it does not purport, therefore, to present a true and accurate picture of the actual transactions which took place between the wholesaler and the dealer?

Mr. Milam:

We object, if Your Honor please. The answer would be a conclusion of the witness.

Mr. Steeg:

The answer is strictly a fact sir. Strictly a fact. He knows what is on there. He knows what is on the invoice.

It is strictly a fact.

204 A. (Continuing) My list presents a true and correct picture of the bottles of cordial, and the bottles of V. O. that were purchased on that invoice; nothing else.

Q. Therefore, it doesn't show the entire transaction?

A. It does not.

Q. As a matter of fact, on this invoice, retailer purchased one case of 7-Crown, six bottles of various cordials, and 18 bottles of Seagram's V. O. Is that not correct?

A. That is correct. Pardon me, 18 or 16 or 15?

Q. 15, excuse me.

Mr. Milam:

Well, the government objects to the introduction of that document unless somebody is going to identify it and tell us about it, or something.

Mr. Steeg:

I'm afraid that the witness identified it as the written invoice from which he picked out the information for his report.

Mr. Milam:

I think he said it was the same number.

Hearing Examiner:

I think the witness identified it. It is admitted in evidence as Permittee's Exhibit Q.

(The document heretofore marked Permittee's Exhibit Q for identification, was received in evidence.)

By Mr. Steeg:

Q. You made no note, either on this instrument or in your report, that there were 14 transactions between
205 Magnolia Liquor Company, Inc., and Mr. Autin during that period?

What was the answer?

A. I was waiting for you to finish, sir.

Q. I finished the question.

A. No, sir.

Q. Now, will you look at your exhibit, under Autin, and get the items of December 28, 1950, Invoice No. 760. Have you identified that?

A. Yes.

Q. How were you able to establish from that invoice any relationship between the 7-Crown and the V. O., and the gin and the V. O.?

A. One case of 7-Crown and three bottles of V. O. were on that invoice; three bottles of gin and three bottles of V. O. were on that invoice.

Q. I show you an invoice addressed to the St. Charles Tavern, dated December 28, 1950, bearing No. 760, which I'll mark permittee's Exhibit R, and ask if you can show me anywhere on this invoice three bottles of V. O. and three bottles of gin, and three bottles of 7-Crown and three bottles of gin?

A. Very easily, sir. One case of Seagram's fifths of 7-Crown. Next it says six bottles of fifths of Seagram's V. O. Then it is three bottles of fifths of Seagram's gin. By putting three bottles Seagram's gin, and three bottles of Seagram's V. O., together, that does leave three bottles of Seagram's V. O. to go with the one case of Seagram's 7-Crown.

Q. In other words, you broke this down and divided the single item in half in order to make the report as it is here? You did that arbitrarily on your own? It doesn't purport to show what the invoice shows on its face, does it?

206 A. The total amount is identical, sir.

Q. But you imply by this that there are two separate items, one that is related directly to the gin, and one that is related directly to the V. O., don't you?

A. I don't know, sir, how he bought them. I didn't—

Q. Didn't ask you how he bought them. I asked you what you imply on that particular instrument?

A. I'm implying nothing, sir. I'm merely showing what he showed them under the invoice.

Q. Mr. Carrier, did you know that Joe Maselli had a wholesale business, a wholesale liquor basic permit?

A. I don't believe I did then, sir. I had been over there lately because I made floor stock tax checks recently, and when you go in there, you cannot tell from the entrance. You cannot tell—a cursory examination of the name on the front of the window, you cannot tell that there's even any separation at all there. You walk in, the liquor that Joe Maselli has, and a fellow by the name, I think Elms, or something like that, owns or—well, there's an imaginary line across the counter, and the front is retail, and the back is wholesale.

Anytime the man in the front needs anything, he runs in the back and gets it out of Joe Maselli's stock.

Q. Didn't the invoice show he was a wholesale house?

A. I don't recall, sir. I believe Magnolia uses the name of the individual on all of the invoices. I don't recall whether it showed it or not.

Q. Just to refresh your memory, will you look at them. Those are the invoices recently identified.

A. Yes.

Q. And they show City Wholesale Liquor, do they not?

207 A. City Wholesale Liquor, Joseph Maselli.

Q. Didn't you know prior to this hearing that Joe Maselli was a wholesaler?

A. Prior to a few days ago.

Q. Yes.

A. Yes. But Mr. Maselli—incidentally, Mr. Maselli's biggest sales are not in wholesale quantities, but are in retail quantities, for he carries a retail tax stamp. He has very few sales which he makes which are in the wholesale quantities. Out of 5,000 invoices a month, he probably doesn't do 300 wholesale.

Q. Didn't you know on the 1st of November, when you made the check that you just referred to, that Maselli was a wholesale liquor dealer?

A. I didn't make the check the first of November, sir. I didn't make the check until some time—well, it was after Christmas. It's been since Christmas again this year.

Q. You didn't make your floor stock check on the 1st of November?

A. No, sir.

Q. It was after Christmas that you did it?

A. It was after the first of the year, in fact.

Q. At that time, didn't you know that he was a wholesaler?

A. As well as a retailer.

Q. Didn't you know that these invoices were sales by Magnolia Liquor to City Wholesale Liquor prior to this hearing?

A. I didn't pay any attention, sir.

Q. And you called on Mr. DeSommès in the course of your investigation and picked up these two invoices that you have listed here for the Royal Family?

A. I called at the Royal Family, and an elderly lady there told me to contact him, and gave me the number and until today I don't believe I knew he worked for Gelpi. I called the number she gave, and talked to him on the phone. And he said, "Let me talk to her," and he talked to her, and she produced the invoices for me.

Q. Did he advise you at the time that there was no tie-in between him and Magnolia?

A. To the best of my knowledge and belief, I have never seen that man before.

Q. In the course of the telephone conversation, did you have such a discussion?

A. No, sir, at the time I made the check of it—of these invoices, I talked to nobody about anything.

Q. I believe you mentioned earlier in your conversation that while you were making an investigation relating to some parties who were purchasing liquor for other states, that you checked the records, the 52 records of Magnolia to obtain certain information?

A. Yes, sir.

Q. Didn't you also check the commercial records in order to get that information?

A. No, sir, it was unnecessary because under the ruling of the District Supervisor, all liquor going out of the

district, or out of the state, must show on the 52 records the serial numbers.

Q. Were you the only one that made the inspection at that time?

A. Of the 52 records?

Q. Yes.

A. I could not say definitely, sir. If I was in the office, I know I made them, because of the reason that I was particularly interested in that one particular person, who was later apprehended, and I know I was watching the records very carefully, not only of Magnolia, but of all the wholesale liquor places in New Orleans.

209 Q. Now, I have just gone over some several of these amounts with you, Mr. Carrier. We talked about Genard, Mr. Autin, Mr. Maselli. Did you conduct your investigation at the other accounts, other retailers whose names have appeared during the course of this hearing, in the same way?

A. Yes, sir.

Q. You used the same procedure, generally, at each place?

A. Generally, yes.

Q. You selected the invoices at each one of these various retailers at your own discretion?

A. Yes, sir.

Q. You made no record of all of the items on the invoice, but only the selected items for which you were looking at whatever place such an occasion occurred?

A. If there were other items there, I often—I did disregard them. However, some of the invoices, the whole invoice is contained in this record.

Q. And you made no record and furnished no information to the Supervisor, or any other person connected with the department, of any of the invoices which did not show sales between the retailer and the wholesaler, which did not conform to the pattern you were attempting to establish?

A. I can't answer that question, Mr. Steeg. You've got too much in it. Can you break it down? I'm not attempting to establish a pattern. I'm attempting to determine, if there is a pattern, and as far as the other items were concerned; there was no sense in mentioning them.

Q. And, therefore you considered that you had established a pattern when you reported 59 invoices of 18 retailers, a limited number of invoices on the 10 retailers who were named in the citation, after having called on only 78 retailers out of a total number of retailers in New Orleans of approximately 1,500, and in the vicinity of approximately 2,600, and based upon that information you reported a pattern of tie-in sales, and furnished this exhibit, which you hold in your hand, Government's Exhibit 30, to prove it, to prove that the information contained on it showed a willful violation of the 52a and b records.

* * * * *

A. People have gone into stores on many occasions and purchased articles and once they shoplifted. Nobody paid any attention to them in the thousands of times they entered the store. If the detective thinks they've shoplifted, then he pays attention in their going in the store. In going through these numerous items, I couldn't stop and analyze each one of them, but where I thought the pattern had been established by the Magnolia Company in the selling of their merchandise, then I made a notation of it.

Q. That is exactly the point I'm trying to make, Mr. Carrier. You did not go in to make an impartial investigation to determine the facts; you went as a detective to prove the guilt?

A. No, sir, I merely went in as a person to find out all of the facts and whether or not there was any substance to the anonymous phone call we had.

* * * * *

Q. Did you report all the facts?

A. I reported all of the facts which, in my mind and from my experience, constituted tie-in sales.

Q. Did you report all the facts which you found?

A. As far as they, in my opinion, constituted tie-in sales, I did.

* * * * *

211 Q. Mr. Carrier, you stated that you did not report all of the facts, that you only reported all of the facts that you thought were relevant to show so-called and alleged tie-in sales. Isn't that what you said?

A. Please, what do you mean by all the facts?

Q. You didn't report any sales other than a sale which in your opinion was a tie-in sale, regardless of how many other sales there may have been?

A. That's right.

Q. And the reason you did that is that you considered yourself, your obligation, your duty, in the work that you were doing, as a detective to discover tie-in sales pattern?

A. Mr. Steeg:

Mr. Milam:

I object to that.

A. Mr. Steeg, I reported to my superior officers what I consider to be violations of the law. It is then up to them to decide whether or not there shall be any further action taken. I do not report each and every little thing that happens.

212 AMENDED ORDER OF ASSISTANT REGIONAL COMMISSIONER, ALCOHOL AND TOBACCO TAX, DALLAS REGION, INTERNAL REVENUE SERVICE, IMPLEMENTING ORDER OF DIRECTOR, ALCOHOL AND TOBACCO TAX DIVISION, INTERNAL REVENUE SERVICE, MODIFYING ORDER OF DISTRICT SUPERVISOR, TENTH DISTRICT, ALCOHOL AND TOBACCO TAX, BUREAU OF INTERNAL REVENUE. DECEMBER 3, 1953.

United States of America,
Eastern Judicial District,
of Louisiana.

Docket No. S-60—Tenth Supervisory District.

In the Matter of

Permit F. A. A. No. 10-P-784.

Magnolia Liquor Company, Inc.,
328 North Cortez Street,
New Orleans, Louisiana.

The Order heretofore issued in the above entitled proceeding under date of November 30, 1953, is hereby amended in the following particulars:

Paragraph numbered "2" at Page 4 of said Order, particularly the portion thereof reading as follows:

"... but that Permit No. 10-P-784 be suspended for a fifteen day period commencing at 12:01 a. m. on January 28, 1953, and ending at 12:01 a. m. February 12, 1954

..." is hereby amended to read as follows:

213 "... but that Permit No. 10-P-784 be suspended for a fifteen day period commencing at 12:01 a. m. on January 28, 1954, and ending at 12:01 a. m. February 12, 1954."

This Amended Order is executed in quintuplicate originals of which this is the second original.

Signed at Dallas, Texas, this 3d day of December, 1953.

CLAUD B. COOPER,

Assistant Regional Commissioner,
Alcohol and Tobacco
Tax, Dallas Region, Internal
Revenue Service.

214 ORDER OF ASSISTANT REGIONAL COMMISSIONER, ALCOHOL AND TOBACCO TAX, DALLAS REGION, INTERNAL REVENUE SERVICE, IMPLEMENTING ORDER OF DIRECTOR, ALCOHOL AND TOBACCO TAX DIVISION, INTERNAL REVENUE SERVICE, MODIFYING ORDER OF DISTRICT SUPERVISOR, TENTH DISTRICT, ALCOHOL AND TOBACCO TAX, BUREAU OF INTERNAL REVENUE.—NOVEMBER 30, 1953.

United States of America,
Eastern Judicial District,
of Louisiana.

Docket No. S-60—Tenth Supervisory District.

In the Matter of:

Permit F. A. A. No. 10-P-784.

Magnolia Liquor Company, Inc.,
328 North Cortez Street,
New Orleans, Louisiana.

This proceeding originated February 7, 1952, through there having been issued on said date by the District Su-

pervisor, of the Alcohol and Tobacco Tax Division, of the Bureau of Internal Revenue, for the Tenth District thereof, an Order to Show Cause why Permit No. 10-P-784 issued to Magnolia Liquor Company, Inc., of 328 North Cortez Street, New Orleans, Louisiana, should not be suspended. The said Order was issued pursuant to authority therefor provided in Section 4(e), of the Federal Alcohol Administration Act of August 29, 1935 (Section 204(e), Title 27, U. S. Code) and regulations promulgated thereunder, to wit, Sections 182.240 and 182.241,

Regulations No. 3, Bureau of Internal Revenue, as amended by Treasury Decision 5551 (26 CFR 182.240 and 182.241).

Thereafter, and in pursuance of Section 182.243 of said Regulation, as amended by Treasury Decision 5551 (26 CFR 182.243), the matter come on regularly for hearing on April 8, 9, 10, 11, and 12, 1952, at Section D, Orleans Parish, Criminal Courts Buildings, New Orleans, Louisiana, before Leland M. Rennolds, a Hearing Examiner, duly and regularly appointed and acting under Section 11, of the Administrative Procedure Act, of June 11, 1946 (Section 1010, Title 5, U. S. Code) and duly authorized to preside at such hearings by Section 182.239 of Regulations No. 3, Bureau of Internal Revenue, as amended by Treasury Decision 5551 (26 CFR 182.239). Pursuant to stipulation by Counsel, approved by said Hearing Examiner, there was authorized a change in the place of hearing from the place specified in The Order to Show Cause, to wit, the Postal Service Training Section, Second Floor, Federal Office Building, South Street, New Orleans, Louisiana, and further agreeing to a change in the date for the commencement of the hearing from the date set in the Order to Show Cause, to wit, from March 4, 1952, to April 8, 1952.

Thereafter, under date of August 15, 1952, said Hearing Examiner caused to be prepared and filed in said proceeding his Findings and Decision as required by Section 182.253, of Regulations No. 3, Bureau of Internal Revenue, as amended by Treasury Decision 5551 (26 CFR 182.253) and caused a copy thereof to be served upon permittee—respondent herein.

In pursuance of said Findings and Decision of said Hearing Examiner, the District Supervisor, of District

216 No. 10, of the Alcohol and Tobacco Tax Division, Bureau of Internal Revenue, pursuant to the authority accorded him by Section 182.254 of said Regulations No. 3 (26 CFR 182.254), duly issued his Order dated August 22, 1952, suspending Permit No. 10-P-784 issued to Magnolia Liquor Company, Inc., 328 North Cortez Street, New Orleans, Louisiana, for a period of forty-five days beginning at 12:01 a. m. September 20, 1952, and ending at twelve o'clock midnight November 3, 1952. This Order was duly and regularly served by registered mail on August 25, 1952, upon permittee—respondent, herein, Magnolia Liquor Company, Inc., of 328 North Cortez Street, New Orleans, Louisiana.

Subsequently, by reason of there having been filed with the Hearing Examiner on September 8, 1952, under Section 182.255, Regulations No. 3, Bureau of Internal Revenue, as amended by Treasury Decision 5551 (26 CFR 182.255), a Petition for Reconsideration of the Order suspending the permit aforesaid, the District Supervisor, of the Tenth District, Alcohol and Tobacco Tax Division, Bureau of Internal Revenue, under date of September 16, 1952, issued his Amended Order by which the aforementioned Order of August 22, 1952, was amended to change the dates of the forty-five day suspension of permit provided for therein from the dates specified in said Order of August 22, 1952, so as to provide for a suspension of basic Permit No. 10-P-784 for forty-five days, beginning at 12:01 a. m. November 18, 1952, and ending at twelve o'clock midnight January 1, 1953, which Order was duly and regularly served upon permittee—respondent herein by registered mail on September 17, 1952.

The hearing upon the application for reconsideration was, by Order of the Hearing Examiner dated September 217 6, 1952, set to be heard on September 24, 1952, in Room 431, Federal Office Building, New Orleans, Louisiana, at which time and place the said hearing on Petition for Reconsideration was duly and regularly held. Thereafter, under date of October 1, 1952, the Hearing Examiner rendered his Rulings on Respondent's Petition for Reconsideration which, in effect, overruled the same and upheld the findings of fact and conclusions of law previously entered in said proceeding and affirmed the Order of

the District Supervisor imposing a forty-five day suspension of August 22, 1952, as amended by the District Supervisor's Order of September 16, 1952, changing the dates for the said suspension from those set forth in the Order of August 22, 1952, to those set forth in the Order of September 16, 1952, to wit, to the period from 12:01 a. m. November 18, 1952, to twelve o'clock midnight January 1, 1953.

Thereafter, Magnolia Liquor Company, Inc., permittee—respondent herein, filed its appeal pursuant to the provisions of Section 204(e), Title 27, U. S. Code and Section 182.257, of Regulations No. 3, as amended by Treasury Decision 5551 (26 CFR 182.257) with the Head, Alcohol and Tobacco Tax Division, of the Bureau of Internal Revenue, Washington, D. C. [which officer prior to August 11, 1952, the effective date of Treasury Department Order 15-5 had been known and designated as Deputy Commissioner in charge of the Alcohol and Tobacco Tax Division and prior to the effective date of Commissioner's Mimeograph 6720; i. e., November 13, 1951, a said officer had been known and designated as Deputy Commissioner in charge of the Alcohol Tax Unit].

At the time of the institution of this proceeding on February 7, 1952, for administrative purposes, the State of Louisiana was part of District No. 10, of the Alcohol and Tobacco Tax Division, of the Bureau of Internal Revenue, Treasury Department, said district consisting of the States of Louisiana, Texas, and Mississippi.

Orders issued pursuant to Reorganization Plan No. 1 of 1952, particularly Treasury Department Order 150-18 of November 18, 1952, created the Birmingham District of the Bureau of Internal Revenue, consisting of the States of Alabama, Louisiana, and Mississippi, and Treasury Department Order 150-16 of November 14, 1952, effective November 19, 1952, created the Dallas District, of the Bureau of Internal Revenue, consisting of the States of Oklahoma and Texas.

Pursuant to Treasury Department Order 150-2, effective May 15, 1952, the Secretary of the Treasury transferred to the Commissioner of Internal Revenue functions of all officers, employees, and agencies of the Bureau of Internal Revenue except that of the Assistant General Counsel serving as the Chief Counsel, Bureau of

Internal Revenue, and authorized the Commissioner to delegate to his subordinates in the Bureau of Internal Revenue such functions in such manner as he should from time to time direct.

In pursuance of the foregoing authorization and plan, the Secretary of Treasury, by Treasury Department Order 150-26 dated June 15, 1953, effective July 1, 1953, reestablished the administrative districts of the Bureau of Internal Revenue by eliminating the seventeen administrative districts theretofore operative and reduced them to nine administrative regions. By paragraph 3(e), of said order, there was established the Dallas Region, and the

Office of Regional Commissioner, Internal Revenue
219 Dallas, to administer Internal Revenue laws and regulations and activities occurring within the States of Arkansas, Louisiana, Oklahoma, New Mexico, and Texas, with headquarters for this region established at Dallas, Texas.

By Treasury Decision 5900 of May 13, 1952, effective May 14, 1952, and Treasury Decision 5901 of May 15, 1952 effective May 19, 1952, (both of which Treasury Decisions were subsequently amended by Treasury Decision 6043, effective October 9, 1953), there was provided that wherever in rules and regulations applicable to the Bureau of Internal Revenue, and in returns, notices, mimeographs, instructions, circulars, or any other form of publication whatever prescribed, furnished, or used by the Bureau of Internal Revenue, reference to a district supervisor shall be deemed to refer to an Assistant District Commissioner [now, Assistant Regional Commissioner] Alcohol, and Tobacco Tax Division. Treasury Decision, 5901 provided, with relation to said enumerated forms, regulations, instructions, et cetera, the same change should be recognized as to all such documents or publications to which Treasury Decision 5900, approved May 13, 1952, is not applicable; i. e., that reference to an Assistant District Commissioner [now, Assistant Regional Commissioner], Alcohol and Tobacco Tax Division.

By Treasury Decision 6038, approved August 21, 1953, effective August 26, 1953, it is provided that in rules and regulations heretofore prescribed by the Bureau of Internal Revenue and currently applicable in the administration of the Internal Revenue laws, and in re-

turns, notices, mimeographs, instructions, circulars, or other forms of publication of whatever nature heretofore prescribed, furnished, or used in or by the Bureau of Internal Revenue, and currently in use, reference to a district supervisor or an Assistant District Commissioner, Alcohol and Tobacco Tax, shall be deemed to refer to an Assistant Regional Commissioner, Alcohol and Tobacco Tax.

By Treasury Department Order 150-5, effective August 11, 1952, the title of the Deputy Commissioner, in charge of the Alcohol Tax Unit, became that of Head, Alcohol and Tobacco Tax Division; and, by Commissioner's Reorganization Order HRQ-1, effective August 11, 1952, particularly Exhibit B, paragraph 5, the duties of the Alcohol and Tobacco Tax Division are set forth, and, by Operations' Reorganization Order No. 1, effective August 14, 1952, the duties to be performed in connection with matters under the Federal Alcohol Administration Act and other matters enumerated therein, are delegated by the Commission of Internal Revenue to be performed by the Head, Alcohol and Tobacco Tax Division.

Subsequently, by Treasury Department Order 50-29, of July 9, 1953, it was provided that the Bureau of Internal Revenue should thereafter be known as the Internal Revenue Service and that all regulations, mimeographs, forms, and other Internal Revenue and Treasury Department documents should be amended to conform to that Order, but that existing supplies of material should be continued to be used until exhausted.

By Commissioner's Reorganization No. 17, effective July 7, 1953, the title of Head, Alcohol and Tobacco Tax Division, was changed to Director, Alcohol and Tobacco Tax Division, Internal Revenue Service; and, by Commissioner's Reorganization Order No. 28, of Appendix A, Part 3, paragraph 1, said Alcohol and Tobacco Tax Division, was given authority to develop and coordinate policies and programs with respect to the administering and enforcing Internal Revenue laws relating to alcohol; alcoholic beverages, tobacco, and firearms, the Federal Alcohol Administration Act, the Liquor Enforcement Act of 1936, and related laws.

By virtue of all the foregoing and in compliance with Section 182.257c of Regulations 3, Bureau of Internal Revenue

enue, as amended by Treasury Decision 5551 (26 CFR 182.257c), the Director, Alcohol and Tobacco Tax Division Internal Revenue Service, gave consideration to the appeal heretofore mentioned filed by permittee—respondent herein, Magnolia Liquor Company, Inc., from the Order of the District Supervisor, of the Tenth Supervisory District, Alcohol and Tobacco Tax Division, Bureau of Internal Revenue, of August 22, 1952, suspending Wholesaler's Basic Permit No. 10-P-784 and under date of October 29, 1953, the said Director issued his Order in pursuance of Sections 182.257b and 182.257c, of Regulations No. 3, Bureau of Internal Revenue (26 CFR 182.257b and 182.257c), as amended by Treasury Decision 5551 modifying the Hearing Examiner's decision in the above entitled matter suspending Permit No. 10-P-784 issued Magnolia Liquor Company, Inc. of 328 North Cortez Street, New Orleans, Louisiana, and affirming the said Decision as modified by said Order of the said Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, which said Order was duly and regularly served on permittee—respondent herein. A copy of said Order is attached hereto and incorporated herein as fully as if herein set forth in all of its particulars.

222 Now Therefore:

By virtue of the authority vested in me as Assistant Regional Commissioner, Dallas Region, Internal Revenue Service, and pursuant to the directions in the said Order of October 29, 1953, of the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington, D. C.

It Is Hereby Ordered: .

1. That the Findings and Decision of the Hearing Examiner heretofore entered in this proceeding be and the same are hereby modified as directed in the said Order of October 29, 1953, of the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington, D. C., attached hereto.

2. That the Order issued in this proceeding by the District Supervisor, Alcohol and Tobacco Tax Division, Tenth Supervisory District, under date of August 22, 1952, suspending Wholesaler's Basic Permit No. 10-P-784, as further amended by said District Supervisor, be and the same is hereby modified in the particulars and to the extent

specified in the Order of October 29, 1953, issued by the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington, D. C., to wit, that said suspension of Permit No. 10-P-784 issued under the Federal Alcohol Administration Act of Magnolia Liquor Company, Inc., 328 North Cortez Street, New Orleans, Louisiana, be affirmed but not for the period set forth or for the time set forth in the said Order issued by the District Supervisor, of the Tenth District, Alcohol and Tobacco Tax Division, Bureau of Internal Revenue, under date of August 22, 1952, as amended, nor for the time and period specified in the Findings and Decision of the Hearing Examiner issued therein under date of August 15, 1952, but that Permit No. 10-P-784 be suspended for a fifteen day period commencing at 12:01 a.m. on January 28, 1953, and ending at 12:01 a.m. February 12, 1954.

This Order is executed in quintuplicate originals, of which this is the second original.

Signed at Dallas, Texas, this 30th day of November 1953.

17
CLAUD B. COOPER,

Assistant Regional Commissioner,
Alcohol and Tobacco Tax, Dallas Region,
Internal Revenue Service.

224 ORDER OF THE DIRECTOR (formerly Head),
MODIFYING THE HEARING EXAMINER'S
DECISION SUSPENDING THE PERMIT AND
AFFIRMING THE SAID DECISION AS MODI-
FIED—October 29, 1953

Treasury Department
Internal Revenue Service
Alcohol and Tobacco Tax Division
Washington, D. C.

Docket No. S. 60 Tenth Supervisory District (now included
in Dallas Region)

In the Matter of Permit:

FAA No. 10-P-784

Issued to

Magnolia Liquor Company, Inc.,
328 N. Cortez Street,
New Orleans, Louisiana.

A petition of appeal, later amended and supplemented, having been timely filed with me for review of the decision of Hearing Examiner Leland M. Rennolds, dated August 15, 1952, and of the order of the former District Supervisor of the Tenth Supervisory District based thereon, dated August 22, 1952, suspending wholesaler's basic permit No. 10-P-784, issued under the Federal Alcohol Administration Act (49 Stat. 977 et seq.; 27 U. S. C. 201 et seq., hereinafter referred to as the Act) to respondent for a period of 45 days, and having examined and considered the entire administrative record in the proceeding, including the said petition for appeal as amended, oral argument

thereon presented on July 1, 1953 by Messrs. George
225 R. Beneman, Norman J. Morrisson and Abraham
Tunick of Washington, D. C., and Moise S. Steeg,
Jr., of New Orleans, La., attorneys for the respondent, and
the brief filed in connection with this appeal;

I Hereby Find that, as modified herein, the decision and order aforesaid are not of an arbitrary nature, are not without reasonable warrant in fact, and are not contrary to law and regulations.

Section 4(e) of the Act provides in relevant part that a basic permit shall, after due notice and opportunity for hearing, be suspended upon a finding that the permittee has willfully violated any of the conditions thereof. Section 4(d) conditions these permits, among other things, upon compliance with the requirements of Section 5 of the Act and with all other Federal liquor laws, including liquor tax laws.

Section 5(a) of the Act prohibits a wholesaler, among others, from requiring, by agreement or otherwise, any retailer to purchase alcoholic beverages from him to the exclusion in whole or in part of alcoholic beverages sold by others in interstate commerce. Section 5(b) of the Act prohibits a wholesaler from inducing any retailer to purchase alcoholic beverages from him to the exclusion of alcoholic beverages sold by others in interstate or foreign commerce by, among other things, requiring the retailer to take and dispose of a certain quota of any of such products. Both subsections contain the customary jurisdictional limitations with respect to interstate and foreign commerce.

Section 2857 of the Internal Revenue Code (26 U. S. C. 2857) provides that a wholesale liquor dealer shall
 226 keep, in the form and under regulations prescribed by the Commissioner with the approval of the Secretary, daily at his place of business a record of distilled spirits received and disposed of by him, under penalty of \$100 and, on conviction, of a fine of \$100 to \$5,000 and imprisonment of 3 months to 3 years for refusing or neglecting to keep such records on the prescribed form or to make entries therein or for making any false entry therein.

Section 1001 of Title 18 U. S. C. provides that whoever knowingly and willfully falsifies or conceals a material fact in any matter within the jurisdiction of any department or agency of the United States shall be fined not more than \$10,000 or imprisoned not more than 5 years or both.

The respondent was charged with having violated these statutory provisions and thereby having placed his permit in jeopardy by having, between December 1, 1950 and March 31, 1951, to such an extent as substantially to

restrain or prevent transactions by others in interstate or foreign commerce in distilled spirits or wine, willfully engaged in the practice of requiring certain retailers to purchase a certain quantity of cordials, gin or 7 Crown blended whisky with each purchase of Johnny Walker's scotch whisky or Seagram's V. O. Canadian whisky and by inducing such retailers to purchase the cordials, gin and/or 7 Crown whisky by requiring them to take and dispose of a certain quantity of such products with each purchase of Johnny Walker's Scotch whisky or Seagram's V. O. whisky; and by having falsely reported, for the purpose of deceiving the District Supervisor, in its Wholesale Liquor Dealer's Record Forms (Forms 52-A and 52-B) that Seagram's V. O. Canadian whisky was bottled, rectified and distilled at a plant located in Indiana when in fact it was produced and bottled in Canada.

227 A hearing was held on April 8-12, 1952, before Leland M. Rennolds, a Hearing Examiner appointed in accordance with the provisions of the Administrative Procedure Act (5 U.S.C. 1000 et seq.). On August 15, 1952, Mr. Rennolds rendered his decision suspending respondent's permit for a period of 45 days.

On October 1, 1952, Hearing Examiner Rennolds denied respondent's petition for reconsideration of his decision and, on October 9, 1952, respondent filed its petition for appeal. Thereafter several opportunities were afforded respondent to submit informal offers of settlement and proposals of adjustment as contemplated by Section 5(b) of the Administrative Procedure Act (*supra*) but no offer satisfactory to this office was received.

Under the appropriate regulations governing these appeals (27 CFR 1.56, 26 CFR 171.2, 26 CFR 182.257b) I have authority to alter or modify any of the Hearing Examiner's findings and may affirm, reverse, or modify his decision. However, I am limited in my consideration of this appeal to the formal record, submitted for review, and cannot consider the matter *de novo*.

At the oral argument on the appeal and in its brief filed thereafter respondent, although expressly preserving other arguments raised in its petition, urged principally (1) that the record failed to contain substantial evidence that

respondent engaged in the practice of inducing or requiring purchases in the manner specified in the order to show cause "to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products (Act, Secs. 5(a), (b))" and (2) by

228 having stated this one, alone, of the three statutory bases for Federal jurisdiction in the charge contained in the notice to show cause, the Government has bound itself by this selection to proof on that basis so that the case must stand or fall on this point alone, regardless of whether or not the acts charged occurred in the course of interstate commerce or had the direct effect of preventing, deterring, hindering, or restricting others from selling or offering for sale any such products to the retailers in question in interstate or foreign commerce—the other two alternative jurisdictional bases stated in Sections 5(a) and (b).

In this connection it should be noted that the Examiner found (Finding 4) that the products by respondent were produced outside the State of Louisiana and were shipped into Louisiana in interstate or foreign commerce; and (Finding 9) that the Seagram Corporation (respondent's supplier) advised respondent as to the amounts of Seagram's V. O. whisky which would be allotted respondent each month but insisted respondent keep a 45 day supply of it 7 Crown whisky and gin on hand at all times and that employees of Seagram's worked alone and with respondent's employees taking orders and making sales on behalf of respondent with respondent's knowledge (R. 355-356).

Respondent argued that all products sold by it were received by it and entered its warehouse for the application of state stamps and processing and therefore had concluded their interstate journey before sale by respondent. This, of course, is not conclusive. If the whisky was shipped into the state on respondent's order to meet anticipated requirements of certain retailers it would appear still to be in the "stream of commerce" until it reached the retailer. This would be the case even though it passed through the wholesaler's warehouse or was temporarily detained therein. 229 "In such a situation there is a practical continuity of movement from the dis-

tiller or distributor without the state to the retailer within the state * * * " (*Levers v. Anderson*, CA 10 (1946) 153 F. 2d 1008, 1011, citing *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567, 568) and this is true even though the State law, as alleged here, required retailers to purchase their supplies from wholesalers in the State (ib.).

Respondent's vice-president and its sales manager testified that it was surprising how frequently the same customer gives the same order week after week (R. 238). Respondent's president testified that at the end of Seagram's fiscal year each of its divisional managers received the amount of V. O. whisky that would be available for his division and that the Louisiana manager then called him in and told him what Magnolia could expect to receive during the next 6 months. Respondent's president also stated that they then tried to space out this amount over the months proportionately with sales so that they would know what they were going to receive and would have available for certain accounts, "class-accounts" (R. 335-337, 343-344, 361-363) and that they also tried, consistent with delays in receiving dates, to hold a balance on hand so that they could know what they would be able to distribute the following month (R. 339-340) and then they told their salesmen how much they would have to sell (R. 361) leaving it to the salesmen to determine how much each retailer could receive. V. O. whisky being a prestige item, it was necessary to have it available for "class" retailers, although, of course, there is no direct proof that the particular sales referred to in the record were made from stocks ordered in advance to meet such demands. (See *Standard Oil Co. v. FTC* (1951) 340 U. S. 231, 236-238).

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Respondent urges that, because of the fact that the notice did not cover all three jurisdictional requirements, it was mislead and focused its defense on the single aspect charged. In my view the citation sufficiently charged them with violations of Sections 5(a) and (b) of the Act, the detailed terms of which they are held, in law, to know. In any event, in the absence of any affirmative attempt on the part of the Government to prove that particular sales by the respondent occurred in the stream of interstate commerce, it is difficult to see how they have been

injured, even if it were conceded that they had no opportunity to prove the opposite, nor are the cases cited in respondent's brief on appeal persuasive to the contrary.

To a large extent the above discussion is also applicable to the third of the jurisdictional bases in the Act, i.e., that the requirement or inducement prevented (etc.) other persons from selling or offering any such products to the retailer in interstate or foreign commerce. Certainly it must be conceded that, if respondent's Louisiana competitors were selling competitive products to Louisiana retailers in the stream of interstate commerce and were impeded in such sales by respondent's actions, a violation of the Act would ensue regardless of the provisions of Louisiana law and regardless of the fact that all parties directly concerned were located in Louisiana. See *U. S. Frankfort Distilleries* (1945) 324 U. S. 293, 297-299; *U. S. v. Standard Oil Co.* (1949) 337 U. S. 293, 314-315.

But respondent argues that there is no substantial evidence that the requirement and inducement charged had any substantial effect on interstate commerce, pointing out that the actual transactions concerning which
 231 evidence was taken constituted but a small proportion of respondent's trade, that the volume of products which the respective retailers were induced or required to purchase constituted but a minute part of the respondent's total sales of these products and but an infinitesimal portion of the total shipments of all such products into Louisiana. Under respondent's view of the case the Government must, in order to sustain its charge, affirmatively prove enough individual transactions so that their cumulative total will bear a substantial relationship to the total of all such products entering the State. To so construe the statute is to nullify it. Even the total sales of any one wholesaler would only rarely bear a substantial relationship to the total volume of liquors crossing the boundaries of the state in which he is located. It is not my view that Congress intended any such construction or that the words used require it. The references in the Act and in its legislative history to other and prior acts controlling unfair methods of competition and the similarities in the language used indicate clearly to me that Congress had such acts in mind when this one was

drafted and intended that it be similarly construed. See discussion in Decision, pp. 98-128 and cases cited. Rather it is my view that the requirements of proof are satisfied if the Government establishes by substantial evidence of individual transactions a general sales practice or policy on the part of the respondent which involves a method of requiring or inducing purchases prohibited by these sections of the Act under circumstances which would naturally and normally have the effect of channellizing imports in commerce through the particular wholesaler and away from his competitors. See *Alberty v. FTC*, 118 F. 2d 664, *Hastings Mfg. Co. v. FTC*, CA 6 (1946) 153 F. 2d 253, 257-258.

232 From substantial evidence in the record the Examiner found that respondent does an annual business of approximately 6 million dollars, over a third of which occurs during the period here in question, involving about 5000 sales a month; that there are about 2500 retailers (potential customers) in the area served by respondent (Pleading 3); that it is the exclusive distributor for Seagram's products in this area (Finding 5, R. 251-252); that during the period in question the supply of Seagram's V. O. Canadian whisky and Johnny Walker Scotch whisky was insufficient to meet the demand of respondent's customers (Findings 6 and 9); that the Government's trade witnesses were unwilling and reluctant, whereas respondent's witnesses were willing and in a large part interested; that the evidence of respondent's own employees in effect set the stage for the tie-in practices to which the 8 retailer witnesses reluctantly testified (Findings 9, 10, 11). It may also be noted that, although respondent's officers and employees repeatedly stated that it attempted to allocate the products in short supply to retailer customers on a "fair and equitable" basis, they were unwilling or unable when pressed to describe just what this basis was other than to say they considered "everything", including past purchases of their products (R. 234-238, 292-298, 361-369, 376-378). Further, during this period respondent's sales of certain of the products allegedly tied in with these in short supply showed a marked increase (R. 378-385) (attributed by respondent to a special quantity discount), and respondent was partic-

ularly interested in pushing the sale of Seagram's gin during a portion of this period. The Examiner had the opportunity, not available to me in reviewing a lifeless record, of observing the demeanor of the witnesses and therefore of judging the weight which should be given to their testimony. In brief, he believed the testi-

233 mony of the Government's reluctant trade witnesses (Findings 14-22) and was not convinced by respondent's employees' denials that it did not sell its products on a "tie-in" basis. I cannot say that he erred in so doing.

From the above evidence of record the Examiner found that respondent adopted and executed a policy, in order to increase the sale of certain of its products, of willfully requiring through tie-in sales that various retail liquor dealers purchase certain quantities of these products not desired by the retailers in order to purchase certain demand items in short supply desired by such retailers (Finding 9, Decision p. 74) and similarly that respondent adopted and executed a policy, for the same purpose of willfully inducing retailers to purchase certain products plentiful in supply by requiring the retailers to take and dispose of a certain quota of such products with a purchase of demand items in short supply (Finding 10, Decision p. 76).

It must follow that this policy on the part of the respondent had the desired and planned effect of increasing its sales of certain items which it would not otherwise have sold in such quantities and therefore have had a resultant increasing effect upon the shipment to it of such items in interstate commerce. See *Signode Steel Strapping Co. v. FTC*, CA 4 (1942) 132 F. 2d 48, 54; *Oxford Varnish Corp. v. Wiborg*, CA 6, 83 F. 2d 764. Similarly and equally obvious, as was admitted by three of the Government's retailer witnesses (R. 24, 38, 42, 47, 59, 63, 121) these increased purchases of certain brands of products in plentiful supply must have been reflected in a resultant decrease in their purchases of competitive items from other Louisiana wholesalers and so have caused a like decrease in

234 the movement to such wholesalers of these items from their out of state suppliers. It is this effect of channellizing liquor in interstate traffic to one wholesaler and its diversion from his competitors that confers

Federal jurisdiction in this case and not any increase or decrease in the total of such commerce. Nor is the fact that two wholesalers, appearing as witnesses for respondent, testified that their sales of competing products increased during the period in question in conflict with such an effect (particularly in view of the statements of 3 representative retailers that they would have bought competing products from other wholesalers had they not bought from respondent) since the increase might well have been due to other causes—such as the holiday season—and have been greater except for these practices. See *Standard Oil Co. v. U. S.* (1949) 337 U. S. 293, 308-309.

As previously stated respondent directed its oral argument primarily to the points considered above. Several other points, however, were raised in the appeal which merit consideration here.

Respondent reads Sections 5(a) and (b) of the Act as requiring, in establishing a violation of the tie-in sale variety, proof that retailers were *required* or *induced* to purchase a *certain quantity* of the undesired item with *each and every* purchase of the desired item. Respondent urges that the evidence shows no evidence of duress or basis for inducement, yet in its appeal (pp. 4, 5) respondent (in summarizing the testimony of the retailer witnesses) itself admits this compulsion and inducement as an element of several of the transactions, e. g.—

“Argy:

Stated he was told he could purchase V. O. if he bought gin: * * *

235 “Reba:

Was asked by salesman to take gin and V. O. * * *

“Trosatty:

He was told he couldn't buy only the scarce items, but had to buy other products consistent with the permittee's policy * * *

“New:

This dealer * * * purchased one case of gin with one of V. O. at request of a Seagram missionary man. * * *

"Sinopolis:

* * * He wanted an increase in V. O.; he was asked to increase his purchase of other items and he would get consideration of scarce items. * * *

As pointed out by the Examiner (Decision pp. 112-113), the compulsive aspects of tie-in sales in the liquor field have received the attention of the Courts in connection with the enforcement of the Emergency Price Control Act of 1942 (See *Anchor Liquor Co. v. U. S.*, CA 10 (1946) 158 F. 2d 221; *Bowles v. Royal Wine & Liquor Co., Inc.*, CA 7 (1946) 155 F. 2d 137. See also *U. S. v. Kraus & Bros.*, CA 2 (1945) 149 F. 2d 773, 774 and cases cited, reversed on other grounds (1945) 327 U. S. 614; *U. S. v. Armour, D. C. Mass.* (1943) 50 F. Supp. 347). It is no answer to say that the retailer agreed to the deal because that was the only way he could secure the desired item while it was in short supply. Here respondent had the exclusive franchise in his territory for the "short" items, V. O. whisky and Johnny Walker whisky, and the retailers could get them from no one else. They had either to buy them on Magnolia's terms or fail to satisfy their customer's demand for them. Compulsion was there whether expressed or not (See *Landis Machinery Co. v. Chase Tool Co.*, 141 F. 2d 800, cert. den. 323 U. S. 729).

Respondent urges that the evidence fails to establish that the items in short supply were sold *only* on a tie-in basis in a *certain fixed* proportion of the two items involved. Suffice it to say that I do not read the statute as requiring such proof. The Act refers to individual transactions or a "practice". It does not say a continuous uniform practice offered to all alike. Indeed such a construction would run counter to its aim. Nor do I agree that the evidence fails to establish that the tie-in sales excluded products sold or offered by others in interstate commerce. Aside from the natural and justifiable inference that a retailer, in view of his limited capital, will cut down on his purchases from other wholesalers if forced to increase his purchases from a particular supplier, there is the affirmative testimony of representative retailers that if they had not been required to purchase unwanted products from respondent they would have increased their purchases of competing products from other wholesalers likewise sup-

plied from outside the State (See *Hastings Mfg. Co. v. FTC*, CA 6 (1946) 153 F. 2d 253, 256).

Nor is it any answer to say that the tie-in item was a best seller and generally desirable. The fact that the retailer must purchase it when he does not want it or in greater quantities than he desires in order to secure the necessary item is the criterion. For example, several of the retailers testified that they sold 7 Crown and purchased it regularly but that they would not have made a particular purchase at a particular time had they not been
237 forced to do so to get the V. O. or Johnay Walker, indicating that they then had a sufficient stock of that brand.

It is also argued from the titles to subsections (a) and (b) of Section 5 of the Act and certain statements made while the Act was before the Congress that before there can be a violation the acts charged must result in completely tying the retailer to the supplier and reducing it to the status of an exclusive outlet. Under this theory the law would only prohibit a requirement that the retailer buy all his requirements of a particular product or type of product from a particular supplier, or an inducement which completely excludes the products of others. Until that point had been reached, requirements and inducements to purchase through the methods specified in the Act could be indulged in with impunity and the Government would be authorized to intervene only after the damage had been done and competition had been suppressed. The law requires no such construction.

Respondent urges that the Examiner's findings as to tie in sales are arbitrary and capricious and as an example quotes the isolated sentence from the Examiner's Decision "the evidence does not disclose all of the distilled spirits and wine which were tied in" (p. 125). In its context—it occurs in the discussion of one of the conclusions of law and not in the findings of fact—this statement, though perhaps unfortunately worded, refers to the prior findings based upon the specific representative instances concerning which evidence was taken, that respondent had adopted and executed a policy and that such a policy had a real effect on interstate commerce.

238 As a further example, respondent refers to the Examiner's Finding 20 (Decision p. 82) which relates to a January 1, 1951 purchase of assorted liquors from respondent by Jack New, characterized by the examiner as having been made on a "tie-in" basis. A review of the testimony as to this transaction (R. 114-115) leads me to agree with respondent that this is not established. However, I do note that later in his testimony Mr. New (R. 116-118) testified as to a purchase from respondent on January 26 on a "tie-in" basis which, to that extent, at least, supports the finding in question.

Respondent, in urging that the Examiner was prejudiced, cites Finding 8 where the Examiner notes "that practically all Government witnesses, * * * testified pursuant to * * * subpoena, and are not considered * * * to be willing witnesses, while practically all of respondent's witnesses appeared voluntarily without subpoena, and a large majority of them were willing and interested witnesses" (Decision p. 74). Respondent cites this statement to support its claim that "The decision arbitrarily classifies Government witnesses as truthful because they were subpoenaed while the permittee's witnesses are classified as untruthful because they appeared voluntarily" (Appeal, p. 11). I do not regard this as an accurate paraphrase of the finding. But even if it were it is, of course, perfectly proper for the examiner to weigh the evidence and comment on the credibility of the witnesses as indicated by their demeanor on the stand. Their willingness to testify and their possible personal interest are proper considerations in this connection. It would appear obvious, in any event, in view of the respondent's position as the exclusive distributor in this area of items much in demand, that retailers would hesitate to give testimony which might incur respondent's ill will and thereby risk being cut off from a supply of these items to the jeopardy of their businesses (See, for example, Govt. Ex. 29, clause (b)).

239 Respondent urges that the Examiner's rulings with respect to Government Exhibit 25 are in conflict. This exhibit is a copy of an order to show cause, dated July 25, 1946, addressed by the then District Supervisor, 10th Supervisory District, to respondent charging it with having willfully engaged in the practice of selling products on a "tie-in"

basis and thereby having violated Sections 5(a) and (b) of the Act. This exhibit was originally offered by the Government for a limited purpose, i. e., to show that respondent by receiving the order, had been put on notice that tie-in sales violated subsections (a) and (b) of Section 5 of the Act. It was not offered as evidence that the company had engaged in the practice then or more recently (R. pp. 141-142, 143-144, 147, 148). On objection, it was not received in evidence but incorporated in the record for identification purposes only (R. pp. 147-151). Respondent points out that, notwithstanding this fact, the Examiner relied on this document in his Finding as to willfulness (Finding 30, Decision pp. 87-87(a)).

The short answer to this argument is that the Examiner's original ruling was unsound and that the document should have been admitted for the limited purposes offered, i. e., to show that respondent, prior to the acts here charged, had been notified of the unlawful nature of such acts, in proving the willful nature of the later similar acts. The Examiner's admission of the document for identification so that it would be available in the event of later review was, of course, correct and is supported by good judicial
 240 as well as administrative practice. In fairness to the Examiner, I do not want to leave this point without referring to the fact that, subsequent to the proffering of this document, respondent's president brought up the matter of the 1946 citation in direct examination (R. 357) and that the Government's renewal of its motion to have it received in evidence received the following somewhat ambiguous comment from the Examiner: "This order to show cause to which you refer is already incorporated in the record for identification only. The testimony which has just been brought out by the witness for the Permittee has some legal effect on that document * * * although it does certainly not establish in any way the truth or falsity of the allegations in that * * * order to show cause. It is in the record now, as evidence, if it may be considered as evidence, that there was an order to show cause issued on the Magnolia Company. * * * But it is in the record that there was an order issued, and it was dismissed without a hearing. * * * This witness' testimony, whatever it is, is in the record for full consideration" (R. 358-359). Later, during cross ex-

amination, the Examiner, over objection, received in evidence the stipulation, signed by the witness, respondent's president, which terminated the earlier proceeding, for the same limited purpose the order to show cause was offered (R. 389-394). The witness' testimony and the documents in question were all properly reviewed in the Examiner's Findings. Finally, since the existence of the order, its service on the respondent, and the stipulation concluding the proceeding were all in evidence as matters of record, it is difficult to see how consideration of the order itself could have prejudiced the respondent.

Respondent similarly attacks the Examiner's ruling admitting the stipulation that in effect terminated the 1946 proceeding, pointing out in the stipulation that "the
241 signing thereof [shall not] prejudice the legal rights of either party [respondent and the Government] in this, or any future proceedings" (bracketed material supplied) as precluding its admission in evidence on the issue of willfulness. But the signing of the stipulation was not so used here. As pointed out above, these documents were not offered or admitted as proof of the facts stated therein. The fact that respondent had received them and therefore had had notice that the Act prohibited tie-in sales was the only issue. To construe the stipulation as barring its use for this purpose would indeed mean giving it a "most narrow", and in my mind absurd, construction. (See *Sunny Valley Winery v. Berkshire*, CA 2 (1947) 159 F 2d 637 footnote) where the Court implies that a similar stipulation might have been used to establish that a subsequent violation constituted a second offense.

In view of the above, respondent's request (Appeal, p. 12) for information as to the source of the language appearing in the stipulation, as to whether the proceeding in question was one of a group referred to in a certain letter addressed by the Acting Secretary to the President pro tempore of the Senate, and as to whether the then District Supervisor in New Orleans was instructed as to the use or non-use of the stipulation, is denied as clearly irrelevant and immaterial to this appeal. Were the stipulation and the order eliminated from the record, the other evidence therein places respondent's actions clearly within the construction of the term "wilfully" contained in *Arrow Dis-*

tilleries v. Alexander, CA 7 (1940) 109 F 2d 327, 405, 406, as "an intentional doing of the things which the Act denounces" though evidence of an evil purpose or criminal intent be lacking.

242 Insofar as respondent's criticism of Government Exhibit 30 is concerned I feel that this matter is fairly and ably covered in Examiner's Finding 11 (Decision, pp. 77, 78). Certainly the Examiner clearly states his appreciation of the weakness of this document, treating it merely as circumstantial evidence to be considered only in the light of direct testimony and other more substantial evidence. There is no indication that he gave it undue weight.

Respondent questions as arbitrary and capricious (Appeal pp. 18, 19) the Examiner's rejection of certain of its proposed findings and conclusions. Although the Examiner does not, in his Rulings on Respondent's Requested Findings of Fact, state in connection with each proposed finding his reasons for its rejection, his adoption of contrary findings and the discussion of these findings in his decision clearly show the reasons for his action. With these reasons I agree.

The remaining matters relating to the tie-in sales charge, raised in the appeal, and there are many, are either repetitions of points already discussed herein, or were ably covered in the Examiner's exhaustive decision.

Turning now to the question of falsification of records, Charge 2 of the order to show cause in this proceeding, alleged that respondent did knowingly and willfully violate Section 1001, Title 18, and Section 2857, Title 26, United States Code in that it did "*willfully, knowingly, and unlawfully make false and fraudulent entries in . . . Wholesale Liquor Dealer's Record (Forms 52-A and 52-B) . . . which false and fraudulent entries were made for the purpose of and with the intention to deceive the supervisor, . . .*" (Govt. Ex. 2, emphasis supplied). It is

243 admitted that respondent entered in its 52-A and 52-B Forms, Seagram's V. O. Canadian blended whisky produced and bottled in Canada as having been produced or bottled at a Seagram's plant in Lawrenceburg, Indiana (Govt. Ex. 28) and the Examiner so found (Findings 31, 32, 33, Decision pp. 87a, 88). But the Examiner also found

that the fact that these irregularities were not discovered in a series of Government inspections indicated that they were "cleverly concealed" (Finding 34, Decision p. 89). I do not agree. There is no evidence that respondent made any attempt to cover up or hide these errors. The invoices were available for checking against the form and the inaccuracy of the Forms were plain to see. The fact that the erroneous entries were not discovered on the occasion of repeated inspections by Government officers may possibly reflect on the thoroughness of the inspections, but it does not create any inference that the errors were intentionally made or that their existence was concealed, and Finding No. 34 is accordingly modified.

The Examiner also found (Finding 36, Decision p. 90) that Government Exhibit 30, characterized as circumstantial evidence of "tie-in" sales, tended to prove that the records were falsified for the purpose of deceiving the District Supervisor relative to "tie-in" sales. I do not follow this reasoning. Even if the order had stated the purpose of the alleged deception, which it did not, I do not see how the charge could be circumstantially corroborated by evidence that such sales were in fact made. It seems to me that this is a clear example of the fallacy of arguing from mere temporal sequence to cause and effect relationship and that the alleged concealment of the sales by the erroneous entries is casual rather than causal. Finding 36 is for this reason stricken from the Examiner's decision.

244 In Finding 38 (Decision p. 91) the Examiner concludes that respondent's Records 52 were willfully and knowingly falsified by it "with the intent and design of concealing evidence of 'tie-in' sales of distilled spirits and/or wine, and of deceiving the District Supervisor, his agents or employees relative thereto, and such falsification did conceal evidence of 'tie-in' sales and did deceive the District Supervisor". In the six pages of discussion following this Finding (Decision pp. 91-97) the Examiner establishes from the record that the errors were made and had been made over a long period of time; that they should not have been made, that respondent's president was familiar with the regulations as to the keeping of forms; that the testimony of respondent's president was not clear as to how the errors were made and gave the impression that the fact

that occasionally the Canadian whisky came to respondent in the same car with whisky bottled by Seagram's in Lawrenceburg, Indiana, was confusing and may have given rise to the errors, although respondent's Exhibit C covered a shipment of V. O. whisky from Canada through Detroit to the respondent in New Orleans; that apparently the records in Florida wholesale houses in which respondent was an officer were properly kept. With all of this I agree. The Examiner also states that it could not be determined from the forms alone that respondent had disposed of any V. O. nor in what proportions with other products V. O. had been sold to respondent's customers. But all of these facts could have been discovered from the invoices which respondent kept available and which the Government inspectors never asked for (R. 423-424). Further it seems quite clear from the fact that the forms in question do not require the listing of products by brands, that they were not intended to disclose and would not ordinarily disclose a "tie-in" situation—except fortuitously in a situation

245. like this one here where the two products happened to be bottled in different places (Govt. Exs. 28, 31, 32). From the fact that respondent's employees testified that the inspectors did not, in their periodic inspections from June 1944 to May 1951, ask to examine the commercial records the Examiner concluded that the employees knew that falsification on the 52 record was not likely to be discovered by their comparing the forms with the commercial records. But at the time the incorrect entries were first made—apparently around 1944—there had been no such repeated inspections so at that time the employees could not have reached conclusions based upon the repeated failure to examine invoices.

For these reasons and because it appears to me much more reasonable to conclude that the entries were made through carelessness and the routine continuance for a period of some 7 years of an original mistake than as a result of any preconceived plan to conceal a sales practice, I can find no connection between the two charges in the order. By this I do not mean to minimize the importance of respondent's failure to keep proper records or to excuse its acknowledged carelessness. Its negligence in this respect is so gross as to approach a willful disregard for the

specific requirements of the regulations. I must, however, find that the record does not support the finding that the records (admittedly incorrect) were deliberately or intentionally falsified and the Examiner's Decision is modified accordingly.

Respondent's argument that it did not receive the opportunity for compliance required by the Administrative Procedure Act, in the face of the fact that it had been charged with the same offenses in 1946 and agreed to discontinue them, does not merit comment. Moreover, such
246 an opportunity is not applicable in the case of willful violations.

Similarly, the argument that the District Supervisor did not find willfulness, stating his reasons therefor in the order to show cause (26 CFR 182.240a) is equally specious. Each of the charges alleged willfulness; the first continues by referring to a *practice* engaged in with 10 specified retailers and the second refers to recurrent acts as having been knowingly done with intent to deceive. It is difficult for me to see what better reasons could have been given for a finding that the acts were willful.

As to the final point that respondent was not afforded an opportunity for informal settlement of the Form 52 Record charge prior to the institution of proceedings, the regulation (26 CFR 182.240b(a)) is not mandatory but merely provides that such an opportunity be furnished at that time if the District Supervisor believes the matter may be settled informally. Moreover, repeated opportunities for the submission of proposals of adjustment have since been afforded and there is no indication that respondent was prejudiced or that if afforded such an opportunity prior to citation it would have taken advantage thereof.

The power to hear these appeals from the action of the Examiner is discretionary. The regulation reads "However, the Commissioner [in whose stead I act, 26 CFR 182.257b] may, in his discretion, in order to insure uniformity of administrative action, entertain an appeal * * *"
(26 CFR 182.257, emphasis supplied).

247 In view of the modification of the Examiner's Decision and in view of the fact that the period of suspension imposed by the Examiner is substantially greater than that arrived at in the negotiated informal settlement

of similar charges involving contemporary tie-in sales practices on the part of other wholesalers in other parts of the country, and after a careful review of the record, I conclude that the period of suspension of 45 days should be reduced to 15 days, believing that the shorter period will at once operate as an effective deterrent to a repetition of the offenses and at the same time will be commensurate with the sanctions recently received by others for similar offenses.

Wherefore, on this 29 day of October, 1953, the aforesaid Decision of the said Examiner is, except as modified herein, approved and affirmed, and the Assistant Regional Commissioner, Alcohol and Tobacco Tax, Dallas Region, the internal revenue officer now exercising the power and duties, with respect to these proceedings, which were formerly executed by the District Supervisor, 10th Supervisory District, is directed to issue an appropriate order to effectuate the said Decision, as modified, suspending the said permit for a period of 15 calendar days.

DWIGHT E. AVIS,
Director, Alcohol & Tobacco
Tax Division, Internal
Revenue Service.

**SUPPLEMENTAL APPENDIX TO APPELLANT'S AND
APPELLEE'S BRIEFS—FILED JUNE 4, 1955**

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Hearing Examiner's Decision

United States of America, Eastern Judicial
District of Louisiana

In the Matter of:

Permit F.A.A.—No. 10-P-784, issued to:

Docket No. S-60, Tenth Field District Alcohol &
Tobacco Tax Division Bureau of Internal Revenue

Magnolia Liquor Company, Inc., 328 N. Cortez Street
New Orleans, Louisiana

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**EXCERPTS FROM TESTIMONY OF
STEPHEN GOLDRING**

That Seagram's policy has been to send Magnolia's February allocation in January, March in February, so that in line with good business practices, they (Magnolia) knew what they were going to receive, and they tried to keep a balanced stock, so that they would have available stock for certain class accounts, and they knew what they were able to do and could lay out their program for the coming month or months; that there is quite a delay in receiving merchandise from Canada, it takes about two weeks; that all of these things are kept in mind in planning the program; and the distribution of this product; that Magnolia had practically no V.O. from December 5 to December 26; that they tried to maintain some inventory on hand and do not like to be completely out of an item; that Seagram's

347 wanted them to keep a 45 day inventory on Seagram's 7-Crown on hand at all times, due to the fact that there might be shortages or strikes; that Magnolia tried to keep a 45 day inventory of Seagram's 7-Crown; that Seagram's V.O. is a nationally advertised product; that nationally advertised brands of merchandise are about all that can now be sold in volume, Seagram's V.O. is one of the highest priced items and it is a demand item, there is never enough of it; that the closing inventory for December 1950, was 935 cases, a small amount of V.O. in

comparison to what they could use; that at that time Magnolia had 18 or 19 salesmen and if they had been told to go out and freely sell V.O., they would have sold it all in one day; that in New Orleans there are about 1,500 retail liquor dealers, and in Magnolia's trading area, between 2,500 and 2,600 retailers; that Magnolia considers V.O. a prestige number, that Magnolia has some very good accounts, some very large users, and some marginal accounts; that 20 percent of the retailer's licenses in New Orleans change hands every year; that there is one retail license in New Orleans for approximately every 400 men, women, and children; that a business the size of Magnolia's could not operate by disposing of all merchandise as soon as it is received because there are too many accounts which must be taken care of; that on December 4, 1950, 2,700 cases of V.O. were received; December 20, 1950, 1,400 cases; January 2, 1951, 1,000 cases; January 22, 1951, 800 cases; February 14, 1951, 625 cases; March 12, 1951, 750 cases; and on March 19, 1951, 1,559 cases; that from all published statistics for the last number of years Seagram's 7-Crown is decidedly the number one blended whisky item the number one seller both throughout the United States and 348 in the State of Louisiana; that Seagram's 7-Crown is about 30 percent of all blended whisky sold in the State of Louisiana.

That Gordon's gin is number one and Gilby's gin is number two and are by far the two leading sellers in gins in Louisiana; Seagram's gin was at one time a very poor third, and at one time a very poor fourth; that Seagram's gin is the highest priced gin sold in the market; that the brand name of Seagram's gin is Seagram's Ancient Bottle Gin, that it is a yellow gin, and is entirely different from the white gins, does not taste, look, or smell like white gins, such as Gilby's, Gordon's, Hiram Walkers, or Fleischman's, and Magnolia Liquor Company does not try to sell Seagram's gin as a competitive item to any white gin; that Seagram's gin is advertised as a yellow gin, it gets its color from the wood in charred barrels, it is a distinctive gin; that he, Goldring, prepared a statement of the volume of sales of V.O., 7-Crown, and Seagram's gin by the month, for the period of four months involved in this hearing (said statement was admitted in evidence as permittee's Exhibit P); that he never compelled retailers to buy Seagram's gin

or Seagram's 7-Crown blended whisky, in order that they could get Seagram's V.O.; that that was never a policy of his house and he never told it to any one; that his sales position on Seagram's 7-Crown being what it was, that kind of policy definitely was not necessary; that it was never their intention to tie-in any merchandise, they didn't have to and they didn't do it, but tried to conduct their business on a fair and equitable basis.

349 That with respect to the sales position of Magnolia on Seagram's gin, in relation to the practices complained of in the Order to Show Cause, they tried to sell gin every month; they still try to sell gin, they try to sell everything in their house, there was no reason for them to force a man to take anything, that their distribution on Seagram's gin now is probably greater than any gin except Gordon's and Gilby's, that they strive for complete distribution and that is their policy; that he would like to take first place of Gordon's or Gilby's tomorrow, but does not think it is possible in their market, not in the New Orleans area.

That he, Goldring, does not have in his employ a man named Goodman, that Goodman is an employee of Seagram's and does not come around the Magnolia Liquor Company, that he has not seen Goodman in the Magnolia office for some two years; that Mr. Weber is not an employee of the Magnolia Liquor Company, he is an employee of Seagram's, he comes out to the Magnolia office quite frequently and he works alone, and he works with the Magnolia men; that all of the companies in which he, Goldring, is interested, except the Sazarac Company, sell and distribute Seagram's merchandise; that the Sazarac Company is a rectifying house and holds a wholesale license. That as far as he knows the other houses in which he is interested which distribute Seagram's products, have substantially the same sales policies as the New Orleans house.

That he has never been cited, nor has a citation ever been issued against Magnolia Liquor Company, Inc., or Magnolia Liquor Company, the partnership, for any violation of Federal law, except what he considers the
350 blanket citation of 1946, which was dismissed without a hearing; that other than that he has never had any difficulty with the Federal Government, that that applies

to every liquor company in which he is interested, that he has never been cited, nor has he ever been in a hearing before for violation of his basic permits.

That when he says that Seagram's V.O. is a "scarce item" he means that the demand is greater than the supply, and he would like to see it on every one of his products.

On recross examination this witness testified, in substance, that he knew the quantity of V.O. that he was going to receive and from this knowledge proportioned his sales; that he did not put up a quota for his salesmen because he never had dealings with his salesmen directly; that usually at the first of the month told the sales department approximately how many cases of V.O. that they could distribute in the month, the same way that Seagram's told him, Goldring; that Seagram's did not tell him how much gin or how much 7-Crown he could take after these products come off of rationing; that in distributing Seagram's V.O. on a fair and equitable basis, the criterion was distribution, location, availability, the type of customers, quantities of merchandise that he purchased, various things credit factors; everything was taken into consideration; that a good customer did get merchandise and they gave V.O. to every one that they thought was entitled to V.O., that they had a method of distributing more merchandise, that they have every type of customers; that the supply of wine was plentiful and no customer is restricted
 351 except where the demand is greater than the supply; that there were other items relative to which the demand was greater than the supply including Cudisaar scotch; Johnny Walker scotch; Teacher scotch; that he, Goldring, does not personally say how much V.O. a customer will get, that his operations are too broad for that; that when he says that tie-in sales were never made he bases it on his policy; that in connection with tie-in sales he has only stated company policies; that he says it wasn't necessary to tie-in 7-Crown, that no matter how high the sales of a product is, he would try to sell more, if it is available; that he did not testify on direct examination that because of 7-Crown's high sales position, it was not necessary to make tie-in sales; that tie-in sales are never necessary; and tie-in sales shouldn't be practiced, that is why he is here now.

354 **EXCERPTS FROM TESTIMONY OF
MANFRED WILMER**

On cross-examination this witness testified, in substance, that Canadian V. O. was very short in supply during the time in question; that in distributing this product they had always to be governed by the limitations of supply, that they did not always have Seagram's V. O. in stock, that in deciding how much an individual customer would get, they took into consideration how much the customer had on hand; how much the customer needed; what the sales of the customer of Seagram's V. O. had been in the past; what the customer's buying pattern had been in business, or since Magnolia had been doing business with the customer; and they tried as best they could, as fairly as they could, considering the present needs of the customer, and his purchases in the past, his sales in the past, and, of course, balanced against the needs of other customers, Magnolia tried to come to a fair and equitable determination; that the basic purpose was to
355 achieve a distribution as broad as possible; that if certain customers received the same proportionate amounts of V. O. and gin as other customers, then it can only be that the customers, bought those amounts; that if in his distribution system he gave customers a case of V. O. when they bought a case of gin, it was because he thought that the customer needed it, the V. O., and it was made available to him;

369

Excerpt From Findings of Fact

From the record, I find:

1. That between 1944 and 1946 as a partnership, and since 1946 as a corporation, Magnolia Liquor Company has been a wholesale liquor dealer within the meaning of the Federal Alcohol Administration Act; and, at present, it holds F.A.A. Permit No. 10-P-784, covering its premises at 328 N. Cortez Street, New Orleans, Louisiana.
2. That Wholesaler's Basic Permit No. 10-P-784, authorizes the Magnolia Liquor Company, Inc., to engage in the business of purchasing for resale at wholesale distilled spirits and wine, and, while so engaged, to sell, offer and deliver for sale, contract to sell and ship, in interstate and

foreign commerce, the alcoholic beverages so purchased; and said permit is conditioned upon compliance, by the permittee, with section 5 (relating to unfair competition and unlawful practices) of the Federal Alcohol Administration Act; section 6 (relating to bulk sales and bottling) of the Federal Alcohol Administration Act; twenty-first amendment to the Constitution of the United States and laws relating to the enforcement thereof, and all other Federal laws relating to distilled spirits, wine, and malt beverages, including taxes with respect thereto.

373 3. That as a wholesale liquor dealer, respondent does approximately six million dollars of business a year, of which about two and three quarters million transpires between December 1 and March 31. It serves a trading area composed of metropolitan New Orleans and adjoining territory. Within this area, there are between 2,500 and 2,600 retail liquor dealers, all of whom are either customers or potential customers of respondent. During the period, December 1950 through March 1951, respondent handled five different brands of domestic whisky, three Scotch whiskies, one Canadian whisky, three brands of brandy, three brands of rum and three brands of wine. During this period, it employed 18 or 19 salesmen and in-
374 voiced approximately 5,000 separate sales to its customers each month.

4. That during the period, December 1950 through March 1951, all of the five different brands of domestic whisky, all of the three scotch whiskies, all of the one brand of Canadian whisky, all of the three brands of brandy, all of the three brands of rum, and all or practically all of the three brands of wine, handled by respondent, were manufactured outside of the State of Louisiana, and moved in interstate and/or foreign commerce into the State of Louisiana.

5. That since 1944, respondent corporation, and its predecessor, a partnership, has been the distributor for Seagram Distillers' Products within its trading area. These products including Seagram's V. O., a Canadian Blended Whisky produced in Canada; Seagram's 7-Crown, a blended whisky produced in Indiana; and Seagram's Ancient Bottle Gin, produced in Indiana and Kentucky.

6. That during the period December 1950 through March 1951, the supply of Seagram's V. O. available to respondent from its supplier, Seagram's Distillers Corporation, was insufficient to meet the demand of the retail customers in respondent's trading area.

7. That during the calendar years 1949, 1950, and the first six months of 1951, Seagram's 7-Crown blended whisky was the largest selling blended whisky in the United States, in the State of Louisiana and in the New Orleans market.

375 8. That during the investigation of the matters covered in the Order to Show Cause, the Government interviewed 78 retailers out of approximately 2,600 retailers in New Orleans and the surrounding trade area. These 78 retailers were selected by the Investigator from entries in respondent's record 52, which is furnished monthly to the District Supervisor; where the transactions indicated that there were equal amounts of gin and R-153 (Seagram's V. O.) bought, and where it was indicated that scotch whiskies had been purchased. Of the 78 retail dealers interviewed, eight were called as Government witnesses during the administrative hearing. It cannot be presumed, as requested by permittee's finding of fact No. 9, that respondent's transactions with 70 out of the 78 retailers who were interviewed were not in violation of Sections 5(a) or (b) of the Federal Alcohol Administration Act, to any greater extent than it can be presumed, that had all 2,600 retailers been interviewed, transactions with some 266 retailers would have been found to have been in violation of Section 5 of the Act.

The respondent requests a finding to the effect that on the basis of an anonymous phone call that respondent was making "tie-in" sales of Seagram's V. O. with gin and other products, the investigation which preceded this hearing was made. No doubt, the phone call alluded to, by Special Investigator Carrier, in his testimony, had something to do with the initiation of the investigation, however, the District Supervisor did not testify in this case, he makes assignments and supervises investigations. There is evidence that respondent was served with an Order to Show

376 Cause in 1946, there is evidence that bootleggers, persons purchasing liquor from respondent and

transporting same from respondent's place of business to dry counties in violation of law, had been seen in respondent's place. The anonymous phone call did have some part in starting the investigation of respondent's activities, but apparently it was not the sole cause of the investigation. The result rather than the cause of investigation, is more important.

In connection with the number of witnesses called by the Government, number of retailers interviewed, cause of investigation, et cetera, it is noted that practically all Government witnesses, with the exception of one Government employee, attended the hearing and testified pursuant to requirements of a subpoena, and are not considered by the Examiner to be willing witnesses; while practically all of respondent's witnesses appeared voluntarily without subpoena, and a large majority of them were willing and interested witnesses.

9. That respondent and its executives adopted and executed a policy, in order to increase the sales of its products. Seagram Ancient Bottle Gin, Seagram's 7-Crown blended whisky, and wine, of wilfully requiring, through tie-in or combination sales, that various retail liquor dealers purchase from the respondent certain quantities of the named products, not desired by such retail dealers, in order that such retail dealers could purchase and procure from respondent certain quantities of Seagram's V. O. and/or Johnny Walker Scotch, demand items short in supply, desired and needed by such retailers in their businesses.

377 The demand for Seagram's V. O. and Johnny Walker Scotch, during the period in question, was much greater than the availability of these items. This fact afforded respondent an excellent opportunity, through tie-in sales, to increase its sales of Seagram's gin, plentiful in supply, and a poor third or a poor fourth on the list of best sellers of gins. The supply of Seagram's 7-Crown blended whisky was plentiful and was the top selling blended whisky throughout the United States and in the State of Louisiana. The shortage of Seagram's V. O. and Johnny Walker Scotch, afforded respondent an excellent opportunity, through tie-in sales to retain or increase the top sales position, nationally and locally, of Seagram's 7-Crown, which accomplishment was and is a valuable

factor as an advertising slant and for monetary gain. The shortage of supply in Seagram's V.O. and Johnny Walker Scotch, also furnished respondent an opportunity, through tie-in sales, to increase its output of wine, which was very plentiful. The weight of the evidence establishes the fact that respondent availed itself of these opportunities, and in so doing, engaged in unfair competition and unlawful practices.

The evidence discloses that Mr. Stephen Goldring, President of Magnolia Liquor Company, was called to the headquarters office of Seagram Distillers Corporation each year and was there notified what his monthly allotment of Seagram's V. O. was for the succeeding six months. The Seagram corporation, according to the testimony of Mr. Goldring, did not allot Seagram's 7-Crown and Seagram's gin, in any particular amounts to respondent, but insisted that a 45 day supply of Seagram's 7-Crown be kept in stock at all times, and respondent tried to have this amount
378 on hand. There is evidence that Mr. Weber and Mr.

Goodman, employees of Seagram's Distillers Corporation, not on the payroll of respondent, were in New Orleans, Louisiana, as missionary men, worked alone and with salesmen of respondent, and took orders for and made sales on behalf of respondent, on a "tie-in" basis. Respondent's executives knew that Weber and Goodman were in New Orleans and knew that orders taken by these gentlemen, were being filled by respondent. It is contended by the executives that neither they nor the respondent had notice of any representations made by Weber and Goodman to retail liquor dealers in the New Orleans area.

Mr. Stephen Goldring testified that he did not personally say how much V. O. a customer would get, that his operations were too broad for that, that the sales department governed the sales of V. O. to the customers. That everything was taken into consideration in selling Seagram's V. O. to the retail customers. The evidence further indicates that Mr. Manfred Wilmer, Vice-President and Sales Manager of respondent, had charge of all sales records. He testified that they tried to sell as much of everything as they could, that salesmen are employed for that purpose.

Mr. Everist Charles, one of respondent's salesmen, testified that he did not control the availability of Seagram's

V. O., that he tried to sell the book, that one thing he considered was availability of Seagram's V. O. The evidence, however, according to Mr. Charles' own testimony is that he did not know the availability of Seagram's V. O. and was not notified in this respect by his employer and was not given an allotment for sale.

379 The evidence, as an over-all picture, establishes that the aforesaid policy of "tie-in" sales was not only the active policy of respondent but also of its executives.

* * * * *

380 11. That Government Exhibit 30 is a condensed summary of isolated sales made by respondent to 18 retailers out of the 78 whose purchase records were investigated, showing sixty-nine transactions. The list includes some invoices covering delivery of more than one item. It includes some invoices, of different dates, which may be unrelated to each other, which were grouped together by the Government Investigator on his belief that there was a connection between them. Government Exhibit 30 failed to list all of the items appearing on the invoices from which it was prepared. It entirely excluded some invoices of respondent's transactions with the named retailer, admittedly because such invoices would have been incompatible with the investigator's assumption or belief. The Government did not call any of the eighteen retailers named in Government Exhibit 30, as witnesses; nor did it offer evidence from any source as to the circumstances under which the listed sales were made other than the list itself, the testimony of witness Carriar, and other evidence in the record as to the general policy of respondent. The Investigator who prepared Government Exhibit No. 30 admitted that the transactions listed may not have been "tie-in" sales. Government Exhibit No. 30, standing alone would have practically no value as evidence.

After Government Exhibit No. 30 was admitted in evidence, permittee's Exhibit X was admitted in evidence, and this exhibit shows all transactions, during the period in question, between respondent and the 18 retail liquor dealers listed on Government Exhibit No. 30.

381 Government Exhibit No. 30, in light of substantial

evidence revealed by the testimony of the eight retail liquor dealers who were Government witnesses, and in light of permittee's Exhibit X, and other evidence in the case as to respondent's policy, constitutes circumstantial evidence tending to establish the fact that some of the transactions shown on Government Exhibit 30, were "tie-in" sales and in violation of Sections 5(a) and (b) of the Federal Alcohol Administration Act.

383 14. That in December 1950, the respondent, sold to Richard J. Gillen, a retail liquor dealer, one case of Nuyen's creme de menthe, on a "tie-in" basis, that is, the retailer was required to buy and was induced to take, the case of creme de menthe, which was not desired by the retailer, in order to procure through purchase from the respondent, one case of Johnny Walker Scotch.

That during the period in question, respondent sold to Gillen, at least 125 cases of Seagram's 7-Crown, on a "tie-in" basis. The principal item desired by the retailer, being Seagram's V.O. Each time Gillen purchased five cases of Seagram's 7-Crown, he also could and did purchase one case of Seagram's V.O.

That this same procedure applied to Seagram's gin. This retailer purchased ten cases of Seagram's gin in order to get an allotment of Seagram's V.O.

That the same procedure applied to Cinzano vermouth, which this witness was required and induced to buy, in order to be able to purchase from respondent, Johnny Walker Scotch.

The respondent requests findings of fact as to specific quantities, relative to purchases by this witness

384 (See respondent's requested finding No. 18). The testimony does not show five cases of Cinzano vermouth tied-in with the sale of one case of Johnny Walker Scotch. At the time of hearing all of this witnesses records had been destroyed. Respondent's counsel used copies of invoices for cross-examination purposes, but the invoices, the possession of which the Government did not have, were not offered in evidence. The evidence indicate, through the general testimony of Gillen, not objected to, that much more merchandise was tied-in by respondent than appears in

respondent's requested findings. Every time Gillen bought 25 cases of Seagram's 7-Crown he got five cases of Seagram's V.O., and he was not a small buyer, with a business of \$150,000 in sales in December 1950, and much of his merchandise was purchased from the Magnolia Liquor Company. Gillen's capital is limited, he still has some of the tied-in merchandise, if he had not been compelled to buy tied-in items in order to get the desired items, he would have bought other products from other wholesalers in New Orleans, Louisiana; through such pressure deals he or his purchasers were placed on a list (apparently a bad credit list kept by wholesalers).

15. That in December 1950, the respondent sold to Sam Lopiceolo, a retail liquor dealer, six cases of Seagram's gin, on a "tie-in" basis, that is, the retailer was required to buy and was induced to take, the six cases of gin, which was not desired, part of which the retailer still has, in order to be able to purchase from respondent, Seagram's V.O. and Seagram's 7-Crown, the supply of which was represented to the retailer to be short.

385 16. That in December 1950 and January 1951, the respondent sold to Gus Argy, a retail liquor dealer, $21\frac{1}{2}$ cases of Seagram's gin, on a "tie-in" basis, that is, the retailer was required to buy and was induced to take, the $21\frac{1}{2}$ cases of gin, which was not desired by the retailer, in order to be able to purchase from respondent three cases of Seagram's V.O., which was in great demand. The respondent asked the retailer to push the sales of Seagram's gin over his bar, to try to sell more.

17. That on January 11, 1951, the respondent sold to John Reba, a retail liquor dealer, $\frac{1}{2}$ case of Seagram's gin, on a "tie-in" basis, that is, the retailer was required and induced to buy and take, the $\frac{1}{2}$ case of gin, which was not desired by the retailer in order to be able to purchase from respondent, $\frac{1}{4}$ case of Seagram's V.O., which was in great demand and was needed by the retailer, John Reba, in his business.

18. That on December 27, 1950, January 17, 1951, and January 31, 1951, respondent sold to Frank Trosatty, a retail liquor dealer, a total of $31\frac{1}{2}$ cases and 12 half pint bottles of Seagram's 7-Crown blended whisky, on a "tie-in" basis, that is, the retailer was required and induced to buy

and to take, this quantity of Seagram's 7-Crown, in order to be able to purchase from respondent, 12 one-half pints, six pints and six fifths of Seagram's V. O., which was in great demand and was needed by the retailer.

That the retailer, in this instance, could have purchased other items in place of the Seagram's 7-Crown
386 but could not purchase Seagram's V. O. unless some other product sold by respondent was "tied-in".

19. That on January 18, 1951 and February 15, 1951, respondent sold to Bing Crosby, a retail liquor dealer, a total of six cases of Seagram's 7-Crown and two cases of Seagram's gin, on a "tie-in" basis, that is, the retailer was required and induced to buy and take this quantity of Seagram's 7-Crown blended whisky and Seagram's gin, in order to be able to purchase from respondent, four cases of Seagram's V. O., which was in great demand and which was needed by the retailer.

That Mr. Alex Baudin, a salesman for Magnolia, explained to this retailer the policy of selling Seagram's V. O., and the policy was represented to be seven cases of 7-Crown with one case of V. O., or one case of Seagram's gin with one case of Seagram's V. O., but Magnolia did not hold this retailer to those particular requirements.

20. That in January 1951, the respondent sold to Jack New, a retail liquor dealer, on two occasions, a total of six one-half pint bottles and three quarts of Seagram's 7-Crown, one bottle of brandy, 12 bottles of assorted wines, two bottles of blackberry julep, and one case of Seagram's gin, on a "tie-in" basis, that is, the retailer was required and induced to purchase and take, this quantity of products, plentiful in supply, in order to be able to purchase from respondent, one case and two bottles of Seagram's V. O., which was in great demand and was needed by the retailer.

387 That the salesmen dealing with this retailer, apparently on separate occasions, were Mr. Arsaga and Mr. Goodman, the latter a missionary man for Seagram Distillers Corporation. Mr. Goodman said to the retailer "You take a case of gin, you can have a case of V. O." If this retailer had not been required to buy Seagram's gin in order to get Seagram's V. O., he would have bought Dixie Bell gin instead of Seagram's gin,

that Dixie Bell gin, Seagram's gin, and all other brands of gin, which are sold or offered for sale by wholesale liquor dealers in the State of Louisiana, are manufactured outside of the State of Louisiana, and are transported in interstate commerce into the State of Louisiana.

21. That respondent, in December 1950 and January 1951, had a retail customer, Mr. Anthony J. Sinopolis, a retail liquor dealer, who desired to purchase more of Seagram's V. O. than respondent had permitted him to purchase in the past. Respondent's Salesman No. 2, and another gentleman from the Magnolia Liquor Company, proposed that this retailer buy gin or 7-Crown in order to get V. O. The retailer discontinued making any purchases from respondent.

22. That respondent's transactions with the eight retailers, called as Government witnesses at the hearing, substantially establishes that respondent engaged in the practice of requiring each of said retailers, with the possible exception of Sinopolis, who refused to deal on a "tie-in" basis, to buy with each purchase of Seagram's V. O. or Johnny Walker Scotch, during the period in question, a certain quantity of distilled spirits, Seagram's gin, Seagram's 7-Crown, or wine, sold by respondent.

388 23. That there is no registered distillery located in the State of Louisiana, which produces or manufactures distilled spirits, and there has not been such a distillery located in that state for a period of the past ten years or more. Domestic distilled spirits and wines are distilled spirits and wines manufactured in the United States. Whisky, gin, rum, and brandy, are distilled spirits. The term "distilled spirits" within the meaning of the Federal Alcohol Administration Act, means Ethyl Alcohol, hydrated oxide of Ethyl, spirits of wine, whisky, rum, brandy, gin, and other distilled spirits, including all dilutions and mixtures thereof, for non-industrial use (Section 17(a)(6), Federal Alcohol Administration Act).

24. That the total quantity of distilled spirits products sold by respondent, during the period in question, in gallonage, bottles or cases, through methods of unfair competition and unlawful practices, to retail dealers in the State of Louisiana, as shown by the evidence in this case, was a comparatively small percentage of all such products sold

to all retailers, by respondent, in Louisiana, during that period, and, of course, was still a smaller percentage of all such products imported into the State, or received in the State, by all wholesalers within said State of Louisiana, during the entire year in which such sales were made by the respondent, but in practically all instances of "tie-in" sales, the "tied-in" product was much larger, in quantity, than the principal product desired and purchased by the retailer, in many instances the undesired product was as high as 500 percent of the desired product. If the total importations into the State of Louisiana increased during the year in which such sales were made by respondent, then certainly the proportion as to brands of products imported would have been different, showing a restraint, influence or effect, or interstate and/or foreign commerce, had the unfair competition and unlawful practices not been employed by respondent.

25. That the principal difference between Seagram's Ancient Bottle Gin and other gins, is that the former is aged in wood and is yellow in color. It is a distilled spirits and it is an intoxicating beverage. It is the highest priced domestic gin in the Louisiana market. Of all gins imported into Louisiana during 1949, Seagram's gin was a poor third in volume; during 1950 it was a poor fourth in volume; and during the first six months of 1951 it shared a poor third place in volume; and during the first six months of 1951 it shared a poor third place in volume with Hiram Walker gin. All gins, regardless of brand, sold and offered for sale by wholesalers in Louisiana, moved in interstate and/or foreign commerce into the State of Louisiana. Seagram's Ancient Bottle Gin is a competitive item with Gordon's, Gilby's, Dixie Bell, Hiram Walker, and all brands of gin which are sold in Louisiana, as is shown throughout the record. The respondent, during the period in question, put forth a strong effort to increase the sales position of Seagram's gin. Respondent contends that Seagram's gin is such a distinctive gin in comparison with other gins that it is not a competitive gin and, therefore, if sold on a "tied-in" basis, such sales would not exclude, in whole or in part, interstate transactions in other gins, sold or offered for sale by other persons in interstate com-

merce. There is no merit, under the evidence to this contention.

390 26. That F. Strauss & Son, Inc., a wholesale liquor dealer of New Orleans, Louisiana, sells and distributes Gilby's gin in competition to Seagram's gin, sold by respondent. The same wholesale liquor dealer sells Sunnybrook, Bourbon Deluxe, and P.M. blended whiskies, produced by National Distillers Products Corporation, all imported into the State of Louisiana, in competition to Seagram's 7-Crown blended whisky, imported into the State of Louisiana, and sold by respondent.

That Glazer Wholesale Drug Company, Inc., of New Orleans, Louisiana, a wholesale liquor dealer, sells and distributes Gordon's gin in competition to Seagram's gin, both gins being imported in interstate commerce into the State of Louisiana.

That sales of Seagram's Ancient Bottle Gin and Seagram's 7-Crown blended whisky, by respondent, to retail liquor dealers in New Orleans, Louisiana, and surrounding territory, through methods of unfair competition and unlawful practices, affected adversely the sales of Gilby's gin, Sunnybrook, Bourbon Deluxe, and P.M. blended whiskies by F. Strauss & Son, Inc., and, similar sales of Seagram's gin by respondent, adversely affected sales of Gordon's Gin by the Glazer Wholesale Drug Company, Inc.; and, such sales by respondent, excluded, in whole or in part, distilled spirits, particularly blended whiskies and gins, offered for sale by other persons in interstate commerce.

Mr. Haspel, Manager of Glazer Wholesale Drug Company, Inc., and Mr. Schlenker, Manager of F. Strauss & Son, Inc., testified as witnesses for respondent.

391 Their testimony is, in part, contradictory and, in part, illogical. They testified that the sales in question by respondent in no way affected their sales. They also testified that they did not know or would not swear that such sales by respondent did not adversely affect sales by their companies. They testified that, during the period, their sales increased, and, therefore, their purchases from out of State increased. This latter statement is logical and expresses a necessary conclusion, but it is no more logical and constitutes no more of an expression of natural result, than the fact that products sold

in competition to other products, adversely affect sales of the latter.

In my opinion the testimony of the two named witnesses did not strengthen respondent's case.

27. That respondent, Magnolia Liquor Company, Inc., a wholesale liquor dealer, and all of the retail liquor dealers with whom respondent did business, as shown by the evidence in this case, were located in the State of Louisiana.

28. That neither the District Supervisor, nor any one on his behalf, gave respondent notice, during the period December 1950 through March 1951, nor at any time subsequent to March 1951 and prior to February 7, 1952, date of issuance of the Order to Show Cause, of information received by the District Supervisor to the effect that respondent was tying-in sales of Seagram's gin, Seagram's 7-Crown and other products with Seagram's V. O. and Johnny Walker Scotch; nor did the District Supervisor, or anyone acting for him, warn or call this matter to the attention of respondent in writing and accord respondent an opportunity to demonstrate or achieve compliance with all lawful requirements; and, no such notice or warning was necessary or required.

29. That respondent, from on or about December 1, 1950, to on or about March 31, 1951, in an effort to increase sales of its products, particularly, Seagram's Ancient Bottle Gin, Seagram's 7-Crown blended whisky, and wine; and in the actual accomplishment of that objective, wilfully engaged in the practice of requiring, and did wilfully require, by agreement, that various retail liquor dealers, as shown by the evidence in this case, and particularly seven of the eight retail liquor dealers who testified as witnesses for the Government, purchase from respondent, a wholesale liquor dealer, located in the State of Louisiana, Seagram's Ancient Bottle Gin, Seagram's 7-Crown blended whisky, and/or wine, to the exclusion, in part, of distilled spirits and/or wine, sold or offered for sale by other persons in interstate and/or foreign commerce; and such practice was wilfully engaged in to such an extent as substantially to restrain or prevent transactions in interstate and/or foreign commerce in distilled spirits and wine.

30. That respondent, from on or about December 1, 1950, to on or about March 31, 1951, in an effort to in-

crease sales of its products, particularly, Seagram's Ancient Bottle Gin, Seagram's 7-Crown blended whisky, and wine; and in the actual accomplishment of that objective, did wilfully engage in the practice of inducing and did wilfully induce, various retail liquor dealers, as shown by the evidence in this case, and particularly seven of the eight retail liquor dealers who testified as witnesses for the Government, to purchase from it, a whole-

393 sale liquor dealer, located in the State of Louisiana, Seagram's Ancient Bottle Gin, Seagram's 7-Crown blended whisky, and/or wine, to the exclusion, in part, of distilled spirits and/or wine, sold or offered for sale by other persons in interstate and/or foreign commerce; and, such wilfull inducement was accomplished, by respondent, by wilfully requiring the aforesaid retail liquor dealers to take and dispose of a certain quota of Seagram's Ancient Bottle Gin, Seagram's 7-Crown blended whisky, and/or wine with each purchase, or substantially with each purchase, of Seagram's V.O. whisky and/or Johnny Walker Scotch Whisky; and, such wilfull practice, inducement and requirement was engaged in to such an extent as substantially to restrain or prevent transactions in interstate and/or foreign commerce in distilled spirits and wine.

The element of wilfulness in connection with Findings of Fact Nos. 29 and 30 is supported by much evidence throughout the record, constituting the basis for preceding findings of evidentiary facts, and is further established by evidence, to the effect, that on July 25, 1946, the then District Supervisor, issued an Order to Show Cause why Basic Permit No. 10-P-78¹, held by Magnolia Liquor Company, Inc., 328 N. Cortez Street, New Orleans, Louisiana, should not be suspended. The respondent in that administrative proceeding was the same corporation as the respondent in the case now under consideration. The Order was served on the Magnolia Liquor Company, Inc., on July 26, 1946, by Arthur T. Christy, a Special Investigator of the Alcohol Tax Unit, by personal service on Mr. David Rosenblum, Office Manager of said company. The Order

to Show Cause (Gov. Exh. 25) charged violations
394 of Section 5 of the Federal Alcohol Administration Act, through alleged "tie-in" sales of distilled spirits and wine. Thereafter, on the sixth day of August

1946, the District Supervisor and the Magnolia Liquor Company, Inc., by Stephen Goldring, entered into a written stipulation (Government Exhibit 29) whereby the hearing on the Order to Show Cause was continued for an indefinite period conditioned on the agreement of the respondent (a) hereafter not to violate Sections 5(a) and/or (b) of the Federal Alcohol Administration Act, and (b) not to retaliate against any (retailer) who might have furnished evidence against the respondent. It was further stipulated that the agreement would not constitute an admission of liability by the respondent, nor the signing thereof prejudice the legal rights of either party in that or in any future proceedings. It was further agreed that in the event the Government did not proceed with the hearing on the merits within twelve months from the date of the issuance of the citation, the matter could be dismissed on motion of the respondent. The evidence further discloses that the matter was subsequently dismissed by the District Supervisor. This administrative proceeding put the Magnolia Liquor Company, Inc., on notice that the District Supervisor considered "tie-in" sales, whether the opinion was correct or incorrect, in violation of Sections 5(a) and (b) of the Federal Alcohol Administration Act; and, therefore, any subsequent practice of tying-in merchandise, as shown by the evidence, is strong evidence that the acts of respondent were wilfully and knowingly committed.

* * * * *

4. * * *

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Excerpts From Conclusions of Law

Section 5(a) of the F.A.A. Act makes it unlawful for a wholesaler to require any retailer by agreement or otherwise, to purchase distilled spirits and/or wine from the wholesaler to the exclusion in whole or in part of distilled spirits and/or wine sold or offered for sale by any person in interstate or foreign commerce. The term by agreement or otherwise would appear to be very general and broad in its meaning, sufficiently so to cover "tie-in" sales.

416 Through "tie-in" sales there can be no question that if such practice continues over a sufficient period of time, and in sufficient volume the retailer will finally become a full and absolute exclusive out-let for the whole-

saler's products. The same is applicable to the term "by requiring the retailer to take and dispose of a certain quota". By a continuation of the practice, under Section 5(a) and 5(b), the retailer will or certainly can fall under the complete domination and control of the wholesaler. If the retailer's capital is limited, or if his shelf or storage space is small, he is restricted through "tie-in" sales in the purchase of other products from other wholesalers. In time he would have in stock only products sold by the "vendor". He naturally would attempt to push the sale of the "tied-in" products which he did not desire to purchase and which are ordinarily slow movers, and this the Act attempts to eliminate. If the retailer cannot sell his products he can not remain in business. Tie-in sales can result in exclusive outlets and tied houses, as well as in complete domination and control of the retailer's business by the wholesaler.

The Government does not contend that all of respondent's sales to retailers were on a "tied-in" basis. It is not contended that respondent required or induced retailers to purchase only products sold by respondent. If there had been such a requirement the retail outlets would have been absolute exclusive outlets and completely tied-houses. Neither is it contended that the quota of products which respondent required the retailers to take and dispose of was not changed from time to time. For example, the quota which retailer Bing Crosby was required to
417 take was not exactly the same quota as retailer Richards J. Gillen was required to take.

The requirement of law, to constitute a violation, is that such required and induced purchases be in whole or in part to the exclusion of other products sold or offered for sale by other persons in interstate or foreign commerce. The tied-in products were undoubtedly sold by respondent and purchased by the retailers to the exclusion, in part, of similar products sold or offered for sale by other persons in interstate or foreign commerce. The retailers knew what they were doing, with respect to actual purchases, they purchased products they did not want in order to get products which they did want and such tied-in sales were consummated because of the requirement and inducement on the part of respondent.

In the case of *Federal Trade Commission v. Balme*, 23 F. 2(d) 615, the Circuit Court of Appeals, 2nd Circuit held that a deliberate effort to deceive is not a necessary element in unfair competition, and cited *Thum v. Dickinson* (C.C.A.) 245 F. 609; *Trappey v. McIlhenny Co.* (C.C.A.) 281 F. 23.

An examination of the legislative history of the Federal Alcohol Administration Act (Public No. 401-Seventy-Fourth Congress), with reference to the unfair competition and unlawful practices provisions of the bill, discloses a quotation from Mr. Cullen's remarks, as follows:

"This bill provides for Federal regulation of the liquor industry. It has as its major objectives the protection of the Federal revenue and the prevention of the recurrence of those evils in the liquor traffic which existed prior to and after prohibition. No provision of the bill is violative of the Constitution either because it denies a fundamental right secured by the Constitution or because it invades a field of regulation reserved by the Constitution to the States. Further, wherever power is granted by the bill to put into effect a policy contemplated by the bill, discriminating language has been used, so that the bill, if enacted, will not suffer from the infirmity of invalid delegation of legislative power.

"The committee disclosed that it is necessary by some method of Federal control to provide means by which unscrupulous racketeers may be prohibited from entering or remaining in the liquor business. Until we can do that the Government's efforts to collect the revenue to which it is entitled will be frustrated, at least in part. Further, we must do something to prevent the unfair trade activities of those in the industry who chisel and take advantage of the ignorance of the consumer by dishonest labeling and advertising and by preying on the weakness of others in the industry. Finally, we must do something to supplement legislation by the States to carry out their own policies. The liquor industry is too big and the constitutional and practical limitations on the States are so considerable that they alone cannot do the whole job (Cong. Rec. Vol. 79, No. 151, P. 12178)."

The Finance Committee in its report referred briefly to the background that made the inclusion of fair trade practice provisions seem advisable:

419 "The House bill (sec. 5) prohibited two classes of trade practices. The first class of these prohibited practices were those which tended to produce monopolistic control of retail outlets, such as arrangements for exclusive outlets, creation of tied houses, commercial bribery, and sales on consignment or with the privilege of return. The reports of the National Commission on Law Observance and Enforcement (Wickersham Commission) and of other agencies that conducted surveys of liquor enforcement problems, all indicated that control by producers and wholesalers of retail outlets through the various devices such as those prohibited by the bill has been productive not only of monopoly but also of serious social and political evils which were in large measure responsible for bringing on prohibition. The bill seeks to prevent the recurrence of these evils in the fields that cannot be reached by the States, provided the evils occur in interstate commerce or reach such an extent in the particular case that they constitute a substantial restraint on interstate commerce or deterrent to the free flow of interstate commerce in distilled spirits and wine (S. Rept. No. 1215, Federal Alcohol Control Act, p.p. 6 and 7)".

With reference to the type of commerce affected by the unfair practices prohibited by section 5 of the Act, the Ways and Means Committee's report contains the following statement:

"It should be noted in each instance that the unfair practices above referred to are prohibited only under those circumstances where they occur in the course of interstate or foreign commerce, or . . . The practices here involved are analogous to those prohibited by the antitrust laws (H. Rept. No. 1542, Federal Alcohol Control Bill, P. 12)".

422 5. The respondent, Magnolia Liquor Company, Inc., engaged in unfair competition and unlawful practices through "tie-in" sales as reflected by the evidence, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in dis-

423 tilled spirits and wine; and, the potential restraint or prevention of transactions in interstate or foreign commerce was substantial to still a greater degree. Whether or not a permittee has engaged in unfair competition and/or unlawful practices to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce, within the meaning of sections 5(a) and 5(b) of the Federal Alcohol Administration Act, depends upon the evidence, factual and circumstantial, in each individual case. In the case at bar both present and potential "restraint or prevention" are involved and the "exclusion" provision of the statute is related to the "restraint" provisions. These provisions do not relate to the total amount of products imported into the state, but rather with reference to the affect respondent's practices had on that portion of commerce engaged in by respondent.

* * * * * * * *

435 The word substantially in the phrase "as substantially to restrain or prevent", as used in Sections 5(a) and 5(b) of the Act, is an adverb and means, really, truly, actually, essentially, et cetera, but does not necessarily convey the idea of volume, large or small in each instance. That which is substantial has substance. For example, the findings in this case must be supported by substantial evidence, which does not necessarily have any bearing whatever upon the number of witnesses or quantity of evidence, the important factor is quality or substance of the evidence, the testimony of one witness may constitute substantial evidence in a case, as against the evidence offered by a large number of opposing witnesses.

The practices of respondent excluded in part distilled spirits and wine sold or offered for sale by other persons in interstate and/or foreign commerce, and such

436 practices were engaged in to such an extent as substantially to restrain or prevent transactions in interstate commerce and/or foreign commerce in distilled spirits and wine.

The legislative history of the Act clearly indicates that its designed purpose, and the intendment of Congress, was through regulation of the controversial subject of "liquor" to prevent or eliminate the evils which have traditionally attended the traffic in intoxicating beverages. It is realized

that, if reasonably possible, the statute should be construed so as to give the effect in accordance with its purposes (U.S. v. Brooks, 169 F. 2(d) 840).

6. The Administrative Procedure Act (5 U.S.C.A. 1001-1011) did not change the provisions of any statute but did add to or supplement many statutes, including the Federal Alcohol Administration Act, pertaining to certain requirements, principally to procedure in administrative matters. Section 9 of the Administrative Procedure Act (5 U.S.C.A., 1008 (b)) which excepts cases of "willfulness" from the requirement of notice and opportunity to demonstrate or achieve compliance with all lawful requirements, did not change the meaning of "wilfully violated" as used in Section 4(e) of the Federal Alcohol Administration Act (27 U.S.C.A., 204(e)). Where the Government alleges in an Order to Show Cause, under the Federal Alcohol Administration Act, that a permittee wilfully violated the terms of its permit or license, and the administrative hearing through evidence produced, demonstrates such willfulness and sustains the charge of "wilfully violated", the administrative case, as to the "exception" made by Section 9 of the Administrative Procedure Act, meets requirements of the Administrative Procedure Act and of Section 182.240(a) of Regulations No. 3 (T.D. No. 5551, approved March 5, 1947), and, in such a case it is not necessary or required that the licensee be given notice in writing and an opportunity to comply prior to institution of proceeding looking towards suspension or revocation of a permit or license. The statute in which used is material in construing the meaning of the words "wilfully violated".

Section 4(e) of the Federal Alcohol Administration Act (27 U.S.C.A., 204 (e)) provides, in part:

"A basic permit shall by order of the administrator, after due notice and opportunity for hearing to the permittee, (1) be revoked, or suspended for such period as the Administrator deems appropriate if the administrator finds that the permittee has wilfully violated any of the conditions thereof, provided that for a first violation of the conditions thereof the permit shall be subject to suspension only" (Italic supplied).

Section 9 of the Administrative Procedure Act (5 U.S.C.A. 1008(b)), pertaining to sanctions and powers of administrative agencies, provides, in part:

"Except in cases of *wilfulness* or those in which the public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the
438 licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements . . .". (Italic supplied).

Section 182.240(a) of Regulations No. 3, as amended (Treasury Decision 5551, approved March 5, 1947) provides:

"Except in cases of *wilfulness* or those in which the public interest requires otherwise, and the district supervisor so finds in his citation or order to show cause, stating his reasons therefor, no permit shall be revoked (suspended), unless, prior to the institution of proceedings therefor, facts or conduct warranting such action shall have been called to the attention of the permittee by the district supervisor in writing and the permittee shall have been accorded an opportunity to demonstrate or achieve compliance with all lawful requirements. If the permittee fails to meet all the requirements of the law and regulations within such reasonable time as may be specified by the district supervisor, proceedings for revocation (suspension) of the permit shall be initiated as hereinafter provided. (Secs. 3114, 3121(b), 3170, I.R.C., Secs. 9(b), 12 Public Law 404, 79th Cong.)". (Words "suspended" and "suspension" added, italic supplied).

The above quoted Section 182.240(a) of Regulations No. 3 was originally promulgated for enforcement of Section 3114, I.R.C. relative to "Industrial Alcohol Permits", under which no suspension of a permit is possible, the only alternatives being revocation of permit or dismissal of proceedings. However, Section 171.4(d) of T.D. No. 5550, approved March 5, 1947, extended the procedure prescribed by Regulations No. 3, as amended (26
439 C.F.R., Part 182) to the issuance, amendment, denial, revocation, suspension, and annulment of basic permits under the Federal Alcohol Administration Act insofar as applicable and insofar as such procedure is not in con-

flict with the provisions of such Act. Therefore, in Section 182.240(a) quoted above, I have added the words as indicated, "suspended" and "suspension".

Under the Federal Alcohol Administration Act no permit may be suspended unless the violation or violations of the conditions of such permit have been wilfully committed. If the charge had been lacking in this respect it would have been subject to exception. A non-wilful violation of the Federal Alcohol Administration Act, in respect to revocation or suspension, is no violation at all. If the pleadings had been insufficient as to "wilfully violated" and there had been no exception by respondent to the pleadings, the Government's case would nevertheless fall in the event the substantial evidence failed to prove that the acts complained of were wilfully committed.

A District Supervisor of the Alcohol & Tobacco Tax Division, Bureau of Internal Revenue, is an "investigation officer" and cannot in a case requiring full adjudication under provisions of the Administrative Procedure Act, such as the present case, make findings of fact which are of a binding and final nature upon a licensee, and certainly no such findings could have been made by the District Supervisor, under the Federal Alcohol Administration Act, even prior to the enactment of the Administrative Procedure Act, prior to a full and fair administrative hearing. The

440 District Supervisor did find in the Order to Show Cause, to the extent that he was able or authorized to find, through allegations in the Order to Show Cause, that the acts complained of were wilfully committed and the reasons why, in his opinion, said acts were wilful. It obviously is not necessary to hold two administrative hearings in one administrative case, one for the purpose of determining whether the case is one of "wilfulness" within the meaning of the Administrative Procedure Act and another to determine whether conditions of a permit have been "wilfully violated", rendering said permit subject to suspension, under the Federal Alcohol Administration Act.

It should be recalled that the Administrative Procedure Act has a direct bearing on many statutes dealing with licenses and other matters. Undoubtedly, in some cases a permit may be suspended when the violations are not

wilful but not so under the Federal Alcohol Administration Act.

It can be seen that in some cases involving offenses made criminal by statute, it would be against the "public interest" to require that the offender be notified and accorded opportunity to comply with all lawful requirements. The term "wilfully violated", as used in the F.A.A. Act, is the term having a direct bearing upon the required degree of proof to sustain the alleged charges. Sections 5(a) and 5(b) of the Federal Alcohol Administration Act as well as Section 1001, Title 18, United States Code, and Section 2857, Title 26, United States Code, are in nature criminal statutes, but the application of those laws to the evidence in an administrative proceeding, looking towards suspension of a permit, is a civil proceeding, requiring that the degree of proof, in substantiation of charges, be
 441 by substantial evidence of great weight or preponderance of the evidence, reflected in the record of the case, and not "beyond a reasonable doubt" as in case of a criminal prosecution.

The several counts in pleadings need not be consistent but findings of fact must be consistent. Respondent contends that Sections 5(a) and 5(b) of the Federal Alcohol Administration Act are unconstitutional, and further, that "tie-in" sales constitute no violation of said sections of the Act, but at the same time contends, in the nature of complaint, that the Treasury Department has no jurisdiction in this matter, because the District Supervisor did not give respondent notice in writing, and accord it an opportunity to comply prior to issuance of the Order to Show Cause. This inconsistent stand is taken in face of evidence that the District Supervisor in 1946 notified respondent that in his opinion "tie-in" sales constituted violations of Sections 5(a) and 5(b) of the Act, and respondent signed an agreement (Government Exhibit 29) on August 6, 1946, to thereafter not violate said sections of the law.

The Court in the Arrow Distilleries case, *supra*, held that:

Under provisions of the Federal Alcohol Administration Act requiring finding that the permittee has wilfully violated conditions before permit can be suspended or revoked, phrase "wilfully violated" is satisfied by intentionally

doing of things which the Act denounces or intentionally refraining from doing things which the act requires.

442 I conclude that the acts by respondent as charged in Counts 1 and 2 of the Order to Show Cause were wilfully and intentionally committed, with evil intent, and the degree of wilfullness is within the meaning or requirement of "wilfullness" as used in Section 9 of the Administrative Procedure Act, and within the meaning of "wilfully violated" as used in Section 4 (e) of the Federal Alcohol Administration Act. See—"Arrow Distilleries v. Alexander", 109 F. 2(d) 397; "U.S. v. Ill. Central Railroad Co.", 303 U.S. 239; "U.S. v. Murdock", 290 U.S. 389; "U.S. v. Monarch Distributing Co.", 116 F. 2 (d) 11; "Brink v. U.S.", 148 F. 2(d) 325.

7. It is well settled law that a corporation, as employer, is responsible for the knowledge of facts had by its agents in doing the very business for which the agents were employed, under the general rule of respondeat superior, in instances where the employees were not cheating or defrauding their principal or acting adversely as the other parties to the same transactions in which they were serving, as their principal's agents.

The substantial evidence conclusively shows that respondent's salesmen made and knew that tie-in sales were made. Respondent did not even call several of its salesmen as witnesses and afford them an opportunity to deny that they had sold on a tied-in basis Seagram's 7-Crown, Seagram's Gin and wine with Seagram's V. O. and Johnny Walker Scotch. There is no indication whatever that the salesmen were cheating or defrauding their principal. Each sale made resulted in business and financial gain for respondent. Further, the evidence indicates that the
443 executives of respondent, or some of them, formulated and knew of the tie-in sales policy.

Respondent contends that it is not liable for the acts of the two employees of Seagram Distillers Corporation, engaged in "Missionary Work" in and around New Orleans, Louisiana. Respondent knew that these two agents of Seagram Distillers Corporation were selling liquor for respondent and knowingly filled the orders taken by said agents. In my opinion this evidence is far reaching, from distiller to consumer, not merely from wholesaler to re-

tailer, an effort to accomplish through what would appear to be a remote means that which could not be legally accomplished by its agents in a direct manner. Seagram's V. O. whiskey was shipped from Canada to Seagram's Distillers Corporation at New Orleans, Louisiana, but it was shipped to respondent's place of business and consigned in care of the respondent. It is thought that the activities of the two employees of Seagram's Distillers Corporation, relative to "tie-in" sales, were authorized through implication and ratification, under the evidence, and created the relationship of principal and agent as between respondent and the two employees of the Seagram corporation, and respondent cannot in law accept the benefit and not at the same time accept the responsibility in respect to the "tie-in" sales. The acts of the two employees of the Seagram corporation were for the benefit of the Seagram corporation and the respondent.

* * * * *

447 9. It is well established in administrative law that the technical rules for the exclusion of evidence applicable to jury trials in Courts of record do not apply to proceedings before Federal Administrative Agencies in the absence of a statutory requirement that such rules are to be observed. It is likewise well established that the findings and final decision or order of an administrative agency must be supported by reliable, probative, and substantial evidence, but the fact that the record may contain legally incompetent evidence does not render such findings and decision invalid, nor justify the setting aside of same. (Sec. 7(c), Administrative Procedure Act; *Willapoint Oysters, Inc. v. Ewing*, 174 F. 2(d) 676; *Livers v. Berkshire*, 151 F. 2(d) 935; *Interstate Commerce Commission v. Baird*, 194 U.S. 25; *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, Rehearing denied, 334 U.S. 3; *Hills Bros. v. Federal Trade Commission*, 9 F. 2(d) 41, Cert. denied, 70 L. Ed. 77; *John Benne & Sons, Inc. v. Federal Trade Commission*, 299 F. 468.

During the hearing the Government offered in evidence a copy of an Order to Show Cause, dated July 26, 1946, which was served on David Rosenblum, on July 448 26, 1946, at 32 N. Cortez Street, New Orleans, Louisiana, by Arthur T. Christy. This Order to

Show Cause signed by the then District Supervisor, New Orleans, Louisiana, was initially admitted in the record for identification purposes only (Government Exhibit 25), however, at a subsequent time attorney for respondent went into the matter and brought out by testimony that the administrative matter as represented by said Order was dismissed by the District Supervisor. This testimony had the legal effect of putting the Order in evidence. Even without this testimony the Order was admissible in evidence for the limited purpose of showing that respondent had been put on notice that the District Supervisor thought that tie-in sales as charged in said Order constituted violations of Sections 5(a) and 5(b) of the Federal Alcohol Administration Act, and for the purpose of indicating that any future "tie-in" sales by respondent would be wilfully made. I have considered the Order to Show Cause (Government Exhibit 25) for these limited purposes only. The Order is no proof of the truthfulness or falsity of the allegations contained in it. There is no evidence in the record bearing on those allegations. The record is entitled to show what the subject of stipulation (Government Exhibit 2) consisted of and the nature of that which was dismissed by the District Supervisor.

The stipulation signed by Magnolia Liquor Company, Inc., through Stephen Goldring, dated August 6, 1946, (Gov. Exh. 29) was admitted in evidence, since it is an agreement on the part of respondent and signed by its president. It admits no liability, nor does it admit that "tie-in" sales constitute a violation of the F.A.A.

Act. By it respondent agreed "Hereafter not
449 to violate Sections 5(a) and/or (b) of the Federal
Alcohol Administration Act . . .". Government
Exhibit 30, is circumstantial evidence of a very weak nature, after it was introduced in evidence the respondent was given the full right of cross-examination and availed itself of such right. Thereafter, there was received in evidence permittee's exhibit "X" which has a definite explanatory relationship to Government's Exhibit No. 30.

451 Respondent's brief sets forth, by quotation, a letter dated August 15, 1947, from the Acting Secretary of the Treasury, to the President Pro Tempore of the Senate, which letter is not in evidence, by which was transmitted a draft of a proposed bill to amend the Federal Alcohol Administration Act (Respondent's brief, 17-1). The letter contains the following statement:

"The Department reached the conclusion that such practices violated the provisions of Sections 5(a) and 5(b) of the Act (U.S.C., Title 27, Secs. 205(a) and 205(b) where the transactions were of a nature to affect interstate or foreign commerce".

Respondent states in its brief that nothing came of the proposed bill, and, on March 4, 1949, a new bill, similar in nature (H.R. 324) was introduced but no action was taken on it by Congress.

There are probably more municipal, county, state, and Federal laws and regulations dealing with the subject of "intoxicating liquors", a subject of great controversy since the biblical days of Noah, than there are in relation to any other subject matter. Congress apparently has taken no action, since enactment of the Federal Alcohol Administration Act, to pass additional legislation so as to specifically, in so many words, spell out "tie-in" sales, as between wholesaler and retailer, as a violation of Federal law. Undoubtedly the purpose of Congress in the Federal Alcohol Administration Act, as it now stands, was to

452 regulate the liquor traffic in its relationship to interstate and foreign commerce. The delay or lack of action, in this respect, on the part of the Congress and on the part of the United States Treasury Department, could well mean that they are of the opinion that present law adequately covers the subject, which coverage will be established through administrative and/or judicial interpretation, without additional legislation. I can not say that this is not occurring at the present time.

Wherefore, it is hereby ordered, determined, and adjudicated, that basic permit No. 10-P-784, issued under authority of the Federal Alcohol Administration Act, and now

held by Magnolia Liquor Company, Inc., a wholesale liquor dealer, 328 N. Cortez Street, New Orleans, Louisiana, be, and the same is hereby, suspended for a period of 45 days, beginning at 12:01 A.M., September 20, 1952, and ending at 12:00 o'clock midnight, November 3, 1952.

Let an appropriate order issue forthwith.

LELAND M. RENNOLDS,
Hearing Examiner.

Kansas City, Missouri, August 15, 1952.

457

**Minute Entry of
Argument and Submission—December 13, 1955**

(Omitted in printing)

458

(File Endorsement Omitted)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14914

MAGNOLIA LIQUOR COMPANY, INC., *Appellant*,

versus

CLAUD B. COOPER, Assistant Regional Commissioner,
Alcohol & Tobacco Tax Division, (Dallas Region)
Internal Revenue Service, *Appellee*.

*Appeal from Administrative Ruling Pursuant to
Alcohol Administration Act.*

Before BORAH and JONES, Circuit Judges, and DAWKINS,
District Judge.

Opinion—April 6, 1956

JONES, Circuit Judge: The appellant, Magnolia Liquor Company, Inc., is a wholesale liquor dealer in New Orleans, Louisiana, holding a wholesaler's Basic Permit issued under the Federal Alcohol Administration Act, 27

459 U.S.C.A. §201 et seq. Included in the Act are provisions relating to unlawful practices which, in part, are:

"It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

"(a) Exclusive outlet. To require, by agreement or otherwise, that any retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such requirement is made in the course of interstate or foreign commerce, or if such person engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce; or

460 "(b) 'Tied house.' To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce: * * * (7) by requir-

ing the retailer to take and dispose of a certain quota of any such products; * * *." 27 U.S.C.A. §205.

Proceedings were instituted against the appellant charging it with violation of Section 5 of the Act in requiring certain named customers to purchase gin, Seagram's 7-Crown blended whiskey, or cordials in order to obtain Johnny Walker Scotch whiskey or Seagram's V. O. Canadian whiskey. Sales so made are referred to as "tie-in sales". It was also charged that appellant was remiss in keeping required records. Hearings were had before an examiner who held that the appellant had violated the Act as set forth in both of the charges. The examiner recommended a suspension of appellant's permit for 45 days. An appeal was taken to the Director of the Alcohol and Tobacco Tax Division of the Internal Revenue Service who affirmed the findings as to the tie-in sale violation and reversed the examiner on the infraction of the record keeping requirements. The Director reduced the period of suspension to 15 days. The Assistant Regional Commissioner issued a suspension order from which this appeal was taken.

461 The appellant is the exclusive wholesale distributor in New Orleans for Seagram Distillers Corporation. Of twenty-eight retail liquor dealers interviewed by a Special Investigator of the Alcohol and Tobacco Tax Division eight were called as witnesses. Of these, seven gave testimony from which the Examiner found that they had bought plentiful items in order to get the scarce items. The Investigator testified that, in his effort to ascertain whether appellant was tying V. O. with gin and other products, he picked out isolated invoices for the purpose of demonstrating a pattern. Some of the witnesses testified that they had to buy Seagram's 7-Crown whiskey or Seagram's gin to get V. O. or Johnny Walker. One witness said he was required to buy Seagram's gin in order to get 7-Crown. During the period involved, December, 1950, January, February and March, 1951, the appellant sold 7067 cases of V. O., 29,049 cases of 7-Crown and 2050 cases of Seagram's Gin. The volume of these items in the so-called tie-in sales was 26 cases of V. O., 5 cases of Scotch, 64-1/4 cases of 7-Crown and 12 cases of gin.

In 1946 an order to show cause had been issued to appellant charging tie-in sales. A stipulation between the Alcohol and Tobacco Tax Division and appellant continued indefinitely the hearing on the order to show cause and in the stipulation appellant agreed not to violate "Sections 5(a) and/or (b)" of the Act. The stipulation provided that it "should not constitute an admission of liability by the respondent [appellant], nor the signing thereof prejudice the legal rights of either party in this, or any further proceedings." The Examiner first excluded this stipulation and later admitted it for the limited purpose of showing that the conduct of appellant was willful.

462 The Director stated that he gave no consideration to the stipulation.

In 1947, The Acting Secretary of the Treasury, in a letter to the President Pro Tempore of the Senate, stated that the Department had concluded that tie-in sales violated Sections 5(a) and 5(b) of the Act where the transactions were of a nature to affect interstate commerce. The letter recited that numerous proceedings had been instituted with the result that many suppliers agreed to discontinue such practices. In the letter it was then said:

"This disposition of the cases was due to doubt on the part of the Department as to whether violations of the statute could be established through the 'tie-in' sales. It was contended by members of the industry that 'tie-in' sales were not within the purview of sections 5(a) and 5(b) and that those sections were designed to prevent the creation of exclusive outlets and tied houses only."

The Acting Secretary proposed to amend the Act by adding to Section 5(c) the words "by conditioning the purchase with the purchase of any other distilled spirits, wine, or malt beverages." On two occasions bills were introduced in Congress which would have expressly prohibited tie-in sales. Neither measure passed.

The appellant here contends:

1. That tie-in sales are not prohibited;
2. That tie-in sales have not been proved;
- 463 3. That the proof does not show a practice of tie-in sales "to such an extent as substantially to restrain

or prevent transactions in interstate or foreign commerce";

4. That there was no "willful" violation of the Act;

5. That the suspension of appellant's permit constituted a taking of property without due process of law;

6. That the regulation of trade practices between a wholesaler and retailer of alcoholic beverages violates the Twenty-first Amendment to the United States Constitution; and

7. The sanction imposed is excessive.

Before the adoption of the Eighteenth Amendment to the Federal Constitution, the activities of the Federal Government in the regulation and control of the alcoholic beverage industry had to do with the collection of revenues. During the era of prohibition the saloon gave way to the speakeasy, importing became rum-running, and bootlegging acquired respectability of a sort. The Congress enacted the Volstead Act and undertook by criminal penalties to enforce the constitutional proscription. With the adoption of the Twenty-first Amendment repealing the Eighteenth Amendment, the Federal Government undertook, in addition to imposing taxes in the manufacture and sale of liquor, measures intended to eliminate some of the social and political evils which brought on prohibition and those which later resulted in repeal. In the Proclamation of President Roosevelt of December 5,

1933, declaring that the Eighteenth Amendment had
464 been repealed, the new policy of the Federal Government was thus stated:

"The policy of the Government will be to see to it that the social and political evils that have existed in the pre-prohibition era shall not be revived nor permitted again to exist". 48 Stat. (1933) 1721.

The Congress was not in session when repeal became effective. The National Industrial Recovery Act, 48 Stat. (1933) 195 had recently been enacted and codes of fair competition were being adopted pursuant to its provisions. The codes relating to alcoholic beverages contained provisions which prohibited agreements by vendors from exacting or requiring that any retailer handle or sell only the products of a particular member of the industry. When *Schechter v. United States*, 295 U.S. 495, 55 S. Ct. 837, 79

L. Ed. 1370, 97 A.L.R. 947, brought an end to the National Industrial Recovery Act and the operations under it, most of the practices outlawed by the codes and not held to be unconstitutional were brought within the prohibitions of the Federal Alcohol Administration Act, *supra*. As said in the report of the Ways and Means Committee of the House of Representatives:

"The bill embodies in statutory form so much of the former code system as the committee now deems appropriate and within the constitutional power of Congress to enact. In general, it may be said that the bill incorporates the greater part of the system of Federal control which was enforced by the Government under the codes". H. R. Rep. No. 1542, 74th Cong. 1st Sess. (1935).

465 It is urged that the Act goes beyond the provisions of the codes. Our initial query is whether the Act prohibits, as the codes did not, the so-called tie-in sales. The only case upon this rather narrow question is *Distilled Brands, Inc. v. Dunigan*, 2d Cir. 1955, 222 F. 2d 867, where it was held that tie-in sales were violations of § 5 of the Act. There a wholesaler had purchased a package deal of Scotch whiskey and rum and sold it as it had received it by requiring the retailers who wanted the Scotch to buy a proportionate part of the rum. It was shown that 280 such tie-in sales occurred over a period of two months. The court stated that the two major issues were whether the sales resulted in purchases to the exclusion in whole or in part of other sellers and whether they sufficiently affected interstate commerce. In upholding the finding of violations made by the Alcohol and Tobacco Tax Division, the Court said:

"We agree with the position of the Division that tie-in sales do constitute a sufficient interference with competition to require prohibition within the regulatory scheme of the Federal Alcohol Administration Act, and that § 5, 27 U.S.C. § 205, actually covers such transactions. The Supreme Court has repeatedly characterized tie-in sales as monopolistic in purpose and effect. *International Salt Co. v. United States*, 332 U. S. 392, 68 S. Ct. 12, 92 L. Ed. 20; *Standard Oil*

Co. of California v. United States, 237 U. S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371. Their restraint on commerce is twofold: The buyer is coerced into accepting a product which he would otherwise not have purchased; and other sellers of the tied-in product are to that extent excluded from the market. These two concomitants of the tie-in sale are dealt with separately in § 5, subsection (a), looking toward the effect on the excluded seller, and subsection (b), concerning itself with coercion of the buyer. Both subsections explicitly state that the forbidden practices need not result in complete exclusion of competitive sellers, but that partial interference will suffice.

“Petitioner urges us to limit the statutory prohibition on partial interference to the situation where the wholesaler controls only some of the various kinds of liquors in which the retailer deals, leaving him free to shop around for the others. Thus petitioner suggests that it would be liable if it had prevented the retailers with whom it dealt from buying any whiskey or rum from other wholesalers, but that it is not liable when it only reduces their purchases of other rums. We see no reason so to limit the statute. The broader reading given to § 5 by the administrative tribunal below is in accordance with the construction put thereon by the Treasury Department since 1946. This construction is of considerable weight, particularly when it is so eminently reasonable in the light of the over-all purposes of this regulatory statute.” *Distilled Brands, Inc. v. Dunigan*, 2d Cir. 1955, 222 F. 2d 867, 869.

While there are, in the case before us, some questions raised as to the facts established by the proofs, for the most part the factual phases are without difficulty. The problem posed is primarily one of statutory construction and application. Several of the well recognized rules of statutory construction should be considered in reaching a proper solution of the question raised by this appeal.

As said by Chief Justice Marshall, “Where the mind labors to discover the design of the legislature it seizes everything from which aid can be derived”. *United States v. Fisher*, 2 Cranch 358, 2 L. Ed. 304. The statutory

provisions here under scrutiny although not criminal are penal. Authorization is given to the Secretary of the Treasury to revoke, suspend or annul the permit which the Act requires as a condition to carrying on business. 27 U.S.C.A. §§203, 204. A statute which authorizes the sanction of business cessation is indeed penal. For a comment upon the rule by which such laws are to be construed we again turn to Chief Justice Marshall and find the following: "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself". *United States v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37. See *Tiffany v. Missouri National Bank*, 18 Wall. 409, 21 L. Ed. 862; *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786.

It may be noted that in the congressional enactment of §5, the sub-sections were supplied with titles. The heading of §5(a) is "Exclusive outlet"; and that of §5(b) is "Tied house". The heading of a section of a statute, while not conclusive, is proper to be considered in interpreting the statute where ambiguity exists. *Knowlton v. Moore*, 178 U. S. 41, 20 S. Ct. 747, 44 L. Ed. 969; *Maguire v. Commissioner of Int. Revenue*, 313 U. S. 1, 61 S. Ct. 789, 85 L. Ed. 1149. This rule, like many other rules of statutory construction, is inapplicable where there is no textual ambiguity. *United States v. Minken*, 350 U.S. 179, ... S. Ct. ..., 100 L. Ed. (Adv. p. 191). Tie-in sales do not, of course, and no contention is made that they do, come within the ban against exclusive outlets and tied houses.

Where the meaning of legislation is doubtful or obscure, resort may be had in its interpretation to the reports of congressional committees which have considered the matter. See *Wright v. Mountain Trust Bank*, 300 U. S. 440, 57 S. Ct. 556, 81 L. Ed. 736, 412 A.L.R. 1455, and authorities there cited. Constructing the Act strictly against the Government as we think we must do, and looking to the intent of the Congress as disclosed by the committee report from which we have quoted, we cannot say that the Act prohibited or was intended to prohibit tie-in sales.

The contemporaneous construction of a statute by an administrative agency charged with the duty of enforcement is entitled to respectful consideration. *Fay v. Stand-*

ard Oil Co., 294 U. S. 87, 55 S. Ct. 323, 79 L. Ed. 780. Here we have the Alcohol and Tobacco Tax Division construing the Act in 1946 as prohibiting tie-in sales. But the Division had no such confidence then in its interpretation as to seek enforcement by sanctions. Instead, it sought stipulations. It confessed its doubts as to whether violations could be established through tie-in sales. It recognized the contention of members of the industry that tie-in sales were not prohibited. It sought to have the doubt resolved by an amendment to the Act bringing tie-in sales within the prohibited practices. The Congress did not see fit to grant the administrative request. Counsel for the Government say to us that the simple introduction of a bill to amend a statute, without any further proceedings thereon, "is without meaning for the purposes of statutory interpretation", citing *Order of Railway Conductors v. Swan*, 469 U. S. 329, 520, 67 S. Ct. 495, 91 L. Ed. 471. A recog-

nition of such a principle would not preclude us, in our "labors to discover the design" of the framers of the Act from seizing upon the expressed doubts of the Treasury Department as an aid to construction. The Division recognized that the language of §5 was ambiguous by not attempting, in 1946, to apply the sanctions of the Act to those making tie-in sales. There was a further recognition of the ambiguity in the letter from the Acting Secretary to the President Pro Tempore of the Senate. The doubt which was then recognized by the Treasury Department and its Alcohol and Tobacco Tax Division has not been dispelled from our minds. We resolve that doubt in favor of the appellant and hold that the Act does not prohibit tie-in sales.

The opinion in *Distilled Brands v. Dunigan*, *supra*, gives to §5 the "broader reading" of the administrative tribunal, and finds such to be in accord with "the construction put thereon by the Treasury Department since 1946". Since it does not appear from the opinion in the *Distilled Brands* case that the letter of the Acting Secretary was, before the court, we assume that the court was entitled to find from the evidence before it that there had been a continuous and confident administrative construction consonant with its contention there and here asserted.

The appellant, in addition to its contention that tie-in

sales are not prohibited by the Act, urges other grounds for reversal. Some of these, we think, have merit but the view which we have taken makes a determination of them unnecessary.

470 The order suspending the permit of appellant is set aside and

REVERSED.

471

IN THE UNITED STATES COURT OF APPEALS

No. 14914

MAGNOLIA LIQUOR COMPANY, INC.,

versus

CLAUD B. COOPER, Assistant Regional Commissioner,
Alcohol & Tobacco Tax Division, (Dallas Region)
Internal Revenue Service.

Judgment—April 6, 1956

This cause came on to be heard on the petition of Magnolia Liquor Company, Inc., for appeal from an Administrative Order issued by the Assistant Regional Commissioner, Alcohol & Tobacco Tax Division, (Dallas Region) Internal Revenue Service, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the order of the said Assistant Regional Commissioner suspending the permit of appellant in this cause be, and the same is hereby, set aside and reversed.

472

Clerk's Certificate to foregoing transcript
omitted in printing.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14,914

MAGNOLIA LIQUOR COMPANY, INC., *Appellant*,

VS

CLAUD B. COOPER, Assistant Regional Commissioner,
Alcohol & Tobacco Tax Division, (Dallas Region),
Internal Revenue Service, *Appellee*.

**Order Recalling the Judgment and Permitting the Substitution
of Joseph F. Black in Lieu of Claud B. Cooper—
(August 18, 1956)**

Before BORAH and JONES, Circuit Judges, and DAWKINS,
District Judge.

BY THE COURT:

By motion of the appellee herein it is shown that while the appeal in this Court was pending, Claud B. Cooper, as Assistant Regional Commissioner, Alcohol and Tobacco Tax Division (Dallas Region), Internal Revenue Service, retired from that office on January 31, 1954, and
482 was succeeded by Joseph F. Black on February 1, 1954; and judgment of this Court was thereafter entered on April 6, 1956, without substitution of Joseph F. Black for Claud B. Cooper as a party to this appeal; and it appearing from said motion that it is desired that a petition for certiorari in the Supreme Court of the United States be filed, by reason whereof it is desired that said judgment be recalled and Joseph F. Black be substituted for Claud B. Cooper; and that such other provisions be made by order as may be required; therefore, be it

ORDERED, That the judgment of this Court in this cause bearing date April 6, 1956, be and it is hereby recalled;

That Joseph F. Black, Assistant Regional Commissioner, Alcohol and Tobacco Tax Division (Dallas Region), Internal Revenue Service, be and he is hereby substituted as a party appellee in this cause on appeal for and in lieu

of Claud B. Cooper, nunc pro tunc as of February 1, 1954;

That the opinion of this Court bearing date April 6, 1956, be and it is hereby affirmed and approved as of the date thereof;

483 That judgment be entered pursuant to the aforesaid opinion against the said Joseph F. Black, Assistant Regional Commissioner as aforesaid, nunc pro tunc as of April 6, 1956;

That the time for the filing in the Supreme Court of the United States of a petition for a writ of certiorari in the above entitled cause shall be and hereby is extended to and including September 3, 1956;

That execution upon the judgment of this Court in this cause shall be and hereby is stayed until and including September 3, 1956, pending the filing of a petition in the Supreme Court for a writ of certiorari; and if said petition be so filed, the execution of said judgment shall automatically remain stayed until the Supreme Court shall act upon said petition for certiorari; and

That the suspension order of the aforesaid Assistant Regional Commissioner against Magnolia Liquor Company, Inc., dated November 30, 1953, directing the suspension of its wholesaler's basic permit issued under the Federal Alcohol Administration Act, shall not be enforced pending the time for the filing of a petition for certiorari in the Supreme Court, nor thereafter unless and until the judgment of this Court to be entered herein shall be reversed by the Supreme Court.

484 [Clerk's Certificate to foregoing transcript omitted in printing.]

487 SUPREME COURT OF THE UNITED STATES

(Title Omitted)

**Order Extending Time to File Petition for Writ of
Certiorari—July 2, 1956**

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 3d, 1956.

HUGO L. BLACK

*Associate Justice of the Supreme
Court of the United States.*

Dated this 2nd
day of July, 1956

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SUPREME COURT OF THE UNITED STATES

No. 359, October Term, 1956

JOSEPH E. BLACK, Assistant Regional Commissioner, Alcohol and Tobacco Tax Division (Dallas Region), Internal Revenue Service, *Petitioner*,

v.

MAGNOLIA LIQUOR COMPANY, INC.

Order Allowing Certiorari. Filed October 22, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED

AUG 29 1956

JOHN T. FEY, Clerk

No. — [REDACTED] 14

In the Supreme Court of the United States

OCTOBER TERM, 1956

**JOSEPH F. BLACK, ASSISTANT REGIONAL COMMISSIONER,
ALCOHOL AND TOBACCO TAX DIVISION (DALLAS RE-
GION), INTERNAL REVENUE SERVICE, PETITIONER¹**

v.

MAGNOLIA LIQUOR COMPANY, INC.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

J. LEE RANKIN,

Solicitor General,

VICTOR R. HANSEN,

Assistant Attorney General,

DANIEL M. FRIEDMAN,

Attorney,

Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. _____

JOSEPH F. BLACK, ASSISTANT REGIONAL COMMISSIONER,
ALCOHOL AND TOBACCO TAX DIVISION (DALLAS RE-
GION), INTERNAL REVENUE SERVICE, PETITIONER¹

v.

MAGNOLIA LIQUOR COMPANY, INC.

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT*

The Solicitor General, on behalf of the Assistant Regional Commissioner, Alcohol and Tobacco Tax Division (Dallas Region), Internal Revenue Service, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on April 6, 1956.

OPINION BELOW

The opinion of the court of appeals (Appendix, pp. 12-22) is reported at 231 F. 2d 941.

¹ The respondent in the court below was Claud B. Cooper, petitioner's predecessor in office. By order of August 18, 1956 (Appendix, pp. 23-25), the court substituted petitioner for Mr. Cooper, *nunc pro tunc*, as of February 1, 1954.

JURISDICTION

The judgment of the court of appeals (Appendix, p. 22) was entered on April 6, 1956. The time for filing a petition for a writ of certiorari was extended by Mr. Justice Black on July 2, 1956 to September 3, 1956 (Appendix, p. 25). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether Sections 5 (a) and 5 (b) of the Federal Alcohol Administration Act, which prohibit a wholesaler of distilled spirits from requiring or inducing any retailer to purchase distilled spirits "to the exclusion in whole or in part" of such spirits sold or offered for sale by other persons, prohibit tie-in sales by wholesalers.

STATUTE INVOLVED

Section 5 of the Federal Alcohol Administration Act, 49 Stat. 977, 27 U. S. C. 205, provides in pertinent part:

UNFAIR COMPETITION AND UNLAWFUL PRACTICES

It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

(a) *Exclusive outlet.*

To require, by agreement or otherwise, that any retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any,

such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such requirement is made in the course of interstate or foreign commerce, or if such person engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce; or

(b) "*Tied house.*"

To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce: * * * or (7) by requiring the retailer to take and dispose of a certain quota of any such products; * * *.

STATEMENT

In February, 1952 the Assistant Regional Commissioner of the Alcohol and Tobacco Tax Division, Internal Revenue Service, issued an order (App. 34-39²) directing respondent (a liquor wholesaler) to show cause why its wholesaler's basic permit should not be suspended for having made tie-in sales between December 1, 1950 and March 31, 1951, in alleged willful violation of Sections 5 (a) and 5 (b) of the Federal Alcohol Administration Act.³ After hearing, the examiner found that respondent had violated the Act by making such tie-in sales, and recommended that its permit be suspended for 45 days (Supp. App. 3-156). On appeal, the Director of the Division approved and affirmed (with certain modifications) the examiner's findings,⁴ but reduced the period of

² "App." and "Supp. App." refer to the appendices filed with the court of appeals.

³ Section 4 (e) of that Act authorizes the Secretary of the Treasury to suspend or revoke basic permits for willful violation of the Act. By Treasury Department orders and regulations, the Secretary has delegated his authority. Under his regulations (26 C. F. R., Part 200), suspension or revocation proceedings are decided initially by the hearing examiner. If the Assistant Regional Commissioner agrees with that decision, he enters an order in accordance therewith. If he disagrees, he may file a petition for review with the Director of the Alcohol and Tobacco Tax Division, who may affirm, modify or reverse the examiner's decision. (The respondent similarly has a right of appeal to the Director.) The Assistant Regional Commissioner then enters an order in conformity with the Director's decision.

⁴ The order to show cause also charged, and the examiner found, that respondent had knowingly and willfully made false entries in certain of its records. The Director reversed this finding, on the ground that such errors had been negligent rather than intentional (App. 242-245).

suspension to 15 days (App. 224-247), and the Assistant Regional Commissioner issued an order suspending respondent's permit for that period (App. 222-223). The court of appeals set the order aside on the ground that tie-in sales are not prohibited by the Act.

The pertinent facts, as found by the examiner and approved by the Director, are as follows:

Respondent is the exclusive distributor for Seagram's products in the New Orleans area (Supp. App. 77). It does an annual business of \$6,000,000, and has 2500-2600 customers (Supp. App. 76). Between December 1, 1950 and March 31, 1951 (the period covered by the complaint), V. O. Whiskey and Johnny Walker Scotch were in short supply (Supp. App. 77-80), Seagram's Ancient Bottle gin was a poor seller but plentiful (Supp. App. 92), and Seagram's 7-Crown Whiskey also was plentiful (Supp. App. 80). In order to increase its sales of Seagram's gin and 7-Crown, respondent "adopted and executed a policy" of requiring its retail customers to purchase the latter, which they did not desire, in order to obtain V. O. or Johnny Walker, which they "desired and needed" (Supp. App. 79); and such tie-in sales were made "to such an extent as substantially to restrain or prevent transactions" in interstate or foreign commerce in distilled spirits (Supp. App. 96).

In holding that the Act does not prohibit tie-in sales, the court of appeals expressly refused to follow the contrary holding of the Court of Appeals for the Second Circuit in *Distilled Brands v. Dunigan*,

222 F. 2d 867. The court below declared that since the Act authorizes suspension or revocation of permits for violations it is penal in nature and to be construed "strictly against the Government." The court also relied on the following: that the Act was passed shortly after the National Industrial Recovery Act was held unconstitutional; that it was adopted in order to plug the resulting regulatory gap; that the NRA Alcoholic Beverage Codes had not prohibited tie-in sales; and that the House Committee Report on the Act stated that it "embodies in statutory form so much of the former code system as the committee now deems appropriate and within the constitutional power of Congress to enact." The court noted the Government's contention that since 1946 the Treasury Department had construed the Act as prohibiting tie-in sales—a factor given weight in the *Distilled Brands* case—but it found that contention unpersuasive because of a 1947 letter by the Secretary which, in proposing legislation that would have specifically outlawed tie-in sales, indicated that in 1946 the Department had had "doubt" whether tie-in sales were covered. The court pointed out that this letter had not been called to the court's attention in *Distilled Brands*.⁵

REASONS FOR GRANTING THE WRIT

1. The decision below that tie-in sales are not prohibited by Sections 5 (a) and 5 (b) of the Fed-

⁵ In view of its decision on the statutory question, the court below found it unnecessary to reach other grounds for reversal urged by respondent.

eral Alcohol Administration Act directly conflicts with the decision of the Court of Appeals for the Second Circuit in *Distilled Brands v. Dunigan*, 222 F. 2d 867. In *Distilled Brands*, the court unanimously held (p. 869) that tie-in sales "do constitute a sufficient interference with competition to require prohibition within the regulatory scheme" of the Act, and that Section 5 "actually covers such transactions." The court stated (*ibid.*) that tie-in sales have a twofold restraint on commerce: "The buyer is coerced into accepting a product which he would otherwise not have purchased; and other sellers of the tied-in product are to that extent excluded from the market." The two aspects of the tie-in sale, the court pointed out, are dealt with separately in Section 5 (a) (the excluded seller) and Section 5 (b) (coercion of the buyer). The court also noted that both sections "explicitly state that the forbidden practices need not result in complete exclusion of competitive sellers, but that partial interference will suffice." *Ibid.*

We submit that the court below erred in holding that tie-in sales are not prohibited by the Act. The court's conclusion that the Act was not intended to go beyond the prohibitions in the NRA Codes ignores the significant difference in language between the Codes and the Act. For example, the Codes prohibited the practice of requiring a retailer to handle only the products of a particular seller—an exclusive dealership. The Act, however, broadened this pro-

vision to make it illegal to require or induce a dealer to purchase any distilled spirits "to the exclusion in whole or *in part*" (emphasis added) of distilled spirits sold or offered for sale by other persons in interstate commerce. A wholesaler who requires or induces a retailer to purchase on a tie-in basis thereby excludes "in part" distilled spirits sold or offered for sale by competing wholesalers.

The legislative history supports this construction of the Act. The Federal Alcohol Administration Act, like the Clayton Act, was intended to "prevent * * * monopolies and restraints of trade" (though, of course, in a much narrower area) ~~industry~~ by striking at their causes "in their incipency." H. Rep. 1542, 74th Cong., 1st Sess. (1935), p. 11. Tie-in sales have been repeatedly condemned by this Court as monopolistic in purpose and effect. *E. g.*, *International Salt Co. v. United States*, 332 U. S. 392. Moreover, since exclusive dealing contracts plainly are prohibited under the Act, and since tie-in agreements may have an even greater anticompetitive effect than exclusive dealing contracts (cf. *Standard Oil Co. v. United States*, 337 U. S. 293, 305-306), it would be anomalous if Congress had prohibited the one and sanctioned the other.

The court below also erred, we believe, in holding that, since the Act authorizes suspension or revocation of permits for willful violation, its substantive provisions are to be regarded as penal and therefore to be strictly construed. Regulatory legislation is not to be strictly construed merely because it "may be

the basis of * * * civil proceedings of a preventive or remedial nature * * *." *Securities and Exchange Commission v. Joiner Corp.*, 320 U. S. 344, 353. Suspension of the privilege of engaging in a business because of violation of the applicable statutory standards repeatedly has been viewed as remedial rather than penal. Cf. *Helvering v. Mitchell*, 303 U. S. 391, 399; *Cella v. United States*, 208 F. 2d 783, 789 (C. A. 7), certiorari denied, 347 U. S. 1016, and cases there cited. In any event, the rule of strict construction does not require that legislation be given "the 'narrowest meaning.' It is sufficient if the words are given their fair meaning in accord with the evident intent of Congress." *United States v. Raynor*, 302 U. S. 540, 552.

In sum, we submit that both the language and the legislative history of the Act support the settled view of the agency that the broad provisions of Sections 5 (a) and 5 (b) prohibit tie-in sales.⁶ Although those sections were based upon the NRA Code, they were not a mere reenactment thereof (as

⁶ The court below found the administrative construction of the Act unpersuasive because of a 1947 letter by the Acting Secretary of the Treasury which stated that the Department had settled a number of proceedings instituted against wholesalers in 1946 for having made tie-in sales because of its "doubt" as to "whether violations of the statute could be established through the 'tie-in' sale" (see *infra*, p. 15). As the letter shows, however, the Department's "doubt" was based on the fact that members of the industry had contended that the Act did not prohibit tie-in sales. Such an expression of opinion by the Department is not dispositive of the meaning of the statute. Cf. *Southern Goods Corp. v. Bowles*, 158 F. 2d 587, 590 (C. A. 4).

the court of appeals treated them) but, we believe, were intended to extend the Code prohibitions to outlaw other anticompetitive practices, such as tie-in sales, which tend to further monopolistic tendencies in the alcoholic beverage industry. See De Ganahl, *Trade Practice and Price Control in the Alcohol Beverage Industry*, 7 Law and Contemporary Problems 665. This construction is "eminently reasonable in the light of the over-all purposes of this regulatory statute." *Distilled Brands v. Dunigan*, *supra*, p. 870.

2. The question whether tie-in sales are prohibited by Sections 5 (a) and 5 (b) is an important one in the administration of the Act. Although tie-in sales occur mostly in times of general shortages in the liquor industry (as was the case in 1946 and 1951, when widespread tie-in sales occurred), they also may arise whenever demand for particular products or brands exceeds supply.⁷ Even today, when liquor is relatively plentiful, tie-in sales involving particular brands have been reported to the Alcohol and Tobacco Tax Division. The question thus is one of continuing significance, and proper administration of the Act will be handicapped unless the conflict as to the legality of the practice is resolved by this Court.

⁷ The shortage may be either at the distiller or wholesaler level. Moreover, a wholesaler in a particular area may be in a position to create an artificial shortage by holding back on a particular product or brand.

CONCLUSION

The decision below is in direct and express conflict with that of another court of appeals, and the case presents an important question in the administration of the Federal Alcohol Administration Act. It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,

Solicitor General.

VICTOR R. HANSEN,

Assistant Attorney General.

DANIEL M. FRIEDMAN,

Attorney.

AUGUST 1956.

APPENDIX

In the United States Court of Appeals for the
Fifth Circuit

No. 14914

MAGNOLIA LIQUOR COMPANY, INC., APPELLANT
versus

CLAUD B. COOPER, ASSISTANT REGIONAL COMMISSIONER,
ALCOHOL & TOBACCO TAX DIVISION, (DALLAS REGION)
INTERNAL REVENUE SERVICE, APPELLEE

Appeal from Administrative Ruling Pursuant to
Alcohol Administration Act

(April 6, 1956.)

Before BORAH and JONES, Circuit Judges, and
DAWKINS, District Judge.

JONES, Circuit Judge: The appellant, Magnolia Liquor Company, Inc., is a wholesale liquor dealer in New Orleans, Louisiana, holding a wholesaler's Basic Permit issued under the Federal Alcohol Administration Act, 27 U. S. C. A. § 201 et seq. Included in the Act are provisions relating to unlawful practices which, in part, are:

It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

(a) Exclusive outlet. To require, by agreement or otherwise, that any retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such

person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such requirement is made in the course of interstate or foreign commerce, or if such person engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce; or

(b) "Tied house." To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce: * * * (7) by requiring the retailer to take and dispose of a certain quota of any of such products; * * *." 27 U. S. C. A. § 205.

Proceedings were instituted against the appellant charging it with violation of Section 5 of the Act in requiring certain named customers to purchase gin, Seagram's 7-Crown blended whiskey, or cordials in order to obtain Johnny Walker Scotch whiskey or Seagram's V. O. Canadian whiskey. Sales so made are referred to as "tie-in sales". It was also charged

that appellant was remiss in keeping required records. Hearings were had before an examiner who held that the appellant had violated the Act as set forth in both of the charges. The examiner recommended a suspension of appellant's permit for 45 days. An appeal was taken to the Director of the Alcohol and Tobacco Tax Division of the Internal Revenue Service who affirmed the findings as to the tie-in sale violation and reversed the examiner on the infraction of the record keeping requirements. The Director reduced the period of suspension to 15 days. The Assistant Regional Commissioner issued a suspension order from which this appeal was taken.

The appellant is the exclusive wholesale distributor in New Orleans for Seagram Distillers Corporation. Of twenty-eight retail liquor dealers interviewed by a Special Investigator of the Alcohol and Tobacco Tax Division eight were called as witnesses. Of these, seven gave testimony from which the Examiner found that they had bought plentiful items in order to get the scarce items. The Investigator testified that, in his effort to ascertain whether appellant was tying V. O. with gin and other products, he picked out isolated invoices for the purpose of demonstrating a pattern. Some of the witnesses testified that they had to buy Seagram's 7-Crown whiskey or Seagram's gin to get V. O. or Johnny Walker. One witness said he was required to buy Seagram's gin in order to get 7-Crown. During the period involved, December, 1950, January, February and March, 1951, the appellant sold 7,067 cases of V. O., 29,049 cases of 7-Crown and 2,050 cases of Seagram's Gin. The volume of these items in the so-called tie-in sales was 26 cases of V. O., 5 cases of Scotch, 64 $\frac{1}{4}$ cases of 7-Crown and 12 cases of gin.

In 1946 an order to show cause had been issued to appellant charging tie-in sales. A stipulation between

the Alcohol and Tobacco Tax Division and appellant continued indefinitely the hearing on the order to show cause and in the stipulation appellant agreed not to violate "Sections 5 (a) and/or (b)" of the Act. The stipulation provided that it "should not constitute an admission of liability by the respondent [appellant], nor the signing thereof prejudice the legal rights of either party in this, or any further proceedings." The Examiner first excluded this stipulation and later admitted it for the limited purpose of showing that the conduct of appellant was willful. The Director stated that he gave no consideration to the stipulation.

In 1947, The Acting Secretary of the Treasury, in a letter to the President Pro Tempore of the Senate, stated that the Department had concluded that tie-in sales violated Sections 5 (a) and 5 (b) of the Act where the transactions were of a nature to affect interstate commerce. The letter recited that numerous proceedings had been instituted with the result that many suppliers agreed to discontinue such practices. In the letter it was then said:

This disposition of the cases was due to doubt on the part of the Department as to whether violations of the statute could be established through the "tie-in" sales. It was contended by members of the industry that "tie-in" sales were not within the purview of sections 5 (a) and 5 (b) and that those sections were designed to prevent the creation of exclusive outlets and tied houses only.

The Acting Secretary proposed to amend the Act by adding to Section 5 (c) the words "by conditioning the purchase with the purchase of any other distilled spirits, wine, or malt beverages." On two occasions bills were introduced in Congress which

would have expressly prohibited tie-in sales. Neither measure passed.

The appellant here contends:

1. That tie-in sales are not prohibited;
2. That tie-in sales have not been proved;
3. That the proof does not show a practice of tie-in sales "to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce";
4. That there was no "willful" violation of the Act;
5. That the suspension of appellant's permit constituted a taking of property without due process of law;
6. That the regulation of trade practices between a wholesaler and retailers of alcoholic beverages violates the Twenty-first Amendment to the United States Constitution; and
7. The sanction imposed is excessive.

Before the adoption of the Eighteenth Amendment to the Federal Constitution, the activities of the Federal Government in the regulation and control of the alcoholic beverage industry had to do with the collection of revenues. During the era of prohibition the saloon gave way to the speakeasy, importing became rum-running, and bootlegging acquired respectability of a sort. The Congress enacted the Volstead Act and undertook by criminal penalties to enforce the constitutional proscription. With the adoption of the Twenty-first Amendment repealing the Eighteenth Amendment, the Federal Government undertook, in addition to imposing taxes in the manufacture and sale of liquor, measures intended to eliminate some of the social and political evils which brought on prohibition and those which later resulted in repeal. In the Proclamation of President

Roosevelt of December 5, 1933, declaring that the Eighteenth Amendment had been repealed, the new policy of the Federal Government was thus stated:

The policy of the Government will be to see to it that the social and political evils that have existed in the pre-prohibition era shall not be revived nor permitted again to exist. 48 Stat. (1933) 1721.

The Congress was not in session when repeal became effective. The National Industrial Recovery Act, 48 Stat. (1933) 195 had recently been enacted and codes of fair competition were being adopted pursuant to its provisions. The codes relating to alcoholic beverages contained provisions which prohibited agreements by vendors from exacting or requiring that any retailer handle or sell only the products of a particular member of the industry. When *Schechter v. United States*, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947, brought an end to the National Industrial Recovery Act and the operations under it, most of the practices outlawed by the codes and not held to be unconstitutional were brought within the prohibitions of the Federal Alcohol Administration Act, *supra*. As said in the report of the Ways and Means Committee of the House of Representatives:

The bill embodies in statutory form so much of the former code system as the committee now deems appropriate and within the constitutional power of Congress to enact. In general, it may be said that the bill incorporates the greater part of the system of Federal control which was enforced by the Government under the codes. H. R. Rep. No. 1542, 74th Cong. 1st Sess. (1935).

It is urged that the Act goes beyond the provisions of the codes. Our initial query is whether the Act pro-

hibits, as the codes did not, the so-called tie-in sales. The only case upon this rather narrow question is *Distilled Brands, Inc. v. Duhigan*, 2d Cir. 1955, 222 F. 2d 867, where it was held that tie-in sales were violations of § 5 of the Act. There a wholesaler had purchased a package deal of Scotch whiskey and rum and sold it as it had received it by requiring the retailers who wanted the Scotch to buy a proportionate part of the rum. It was shown that 280 such tie-in sales occurred over a period of two months. The court stated that the two major issues were whether the sales resulted in purchases to the exclusion in whole or in part of other sellers and whether they sufficiently affected interstate commerce. In upholding the finding of violations made by the Alcohol and Tobacco Tax Division, the Court said:

We agree with the position of the Division that tie-in sales do constitute a sufficient interference with competition to require prohibition within the regulatory scheme of the Federal Alcohol Administration Act, and that § 5, 27 U. S. C. § 205, actually covers such transactions. The Supreme Court has repeatedly characterized tie-in sales as monopolistic in purpose and effect. *International Salt Co. v. United States*, 332 U. S. 392, 68 S. Ct. 12, 92 L. Ed. 20; *Standard Oil Co. of California v. United States*, 337 U. S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371. Their restraint on commerce is twofold: The buyer is coerced into accepting a product which he would otherwise not have purchased; and other sellers of the tied-in product are to that extent excluded from the market. These two concomitants of the tie-in sale are dealt with separately in § 5, subsection (a), looking toward the effect on the excluded seller, and subsection (b), concerning itself with coercion of the buyer. Both subsections explicitly state that the forbidden practices need not result in com-

plete exclusion of competitive sellers, but that partial interference will suffice.

Petitioner urges us to limit the statutory prohibition on partial interference to the situation where the wholesaler controls only some of the various kinds of liquors in which the retailer deals, leaving him free to shop around for the others. Thus petitioner suggests that it would be liable if it had prevented the retailers with whom it dealt from buying any whiskey or rum from other wholesalers, but that it is not liable when it only reduces their purchases of other rums. We see no reason so to limit the statute. The broader reading given to § 5 by the administrative tribunal below is in accordance with the construction put thereon by the Treasury Department since 1946. This construction is of considerable weight, particularly when it is so eminently reasonable in the light of the over-all purposes of this regulatory statute. *Distilled Brands, Inc. v. Dunigan*, 2d Cir. 1955, 222 F. 2d 867, 869.

While there are, in the case before us, some questions raised as to the facts established by the proofs, for the most part the factual phases are without difficulty. The problem posed is primarily one of statutory construction and application. Several of the well recognized rules of statutory construction should be considered in reaching a proper solution of the question raised by this appeal. As said by Chief Justice Marshall, "Where the mind labors to discover the design of the legislature it seizes everything from which aid can be derived". *United States v. Fisher*, 2 Cranch 358, 2 L. Ed. 304. The statutory provisions here under scrutiny although not criminal, are penal. Authorization is given to the Secretary of the Treasury to revoke, suspend or annul the permit which the Act requires as a condition to carrying on business. 27 U. S. C. A. §§ 203, 204. A statute which au-

thorizes the sanction of business cessation is indeed penal. For a comment upon the rule by which such laws are to be construed we again turn to Chief Justice Marshall and find the following: "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself". *United States v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37. See *Tiffany v. Missouri National Bank*, 18 Wall. 409, 21 L. Ed. 862; *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786.

It may be noted that in the congressional enactment of § 5, the sub-sections were supplied with titles. The heading of § 5 (a) is "Exclusive outlet", and that of § 5 (b) is "'Tied house' ". The heading of a section of a statute, while not conclusive, is proper to be considered in interpreting the statute where ambiguity exists. *Knowlton v. Moore*, 178 U. S. 41, 20 S. Ct. 747, 44 L. Ed. 969; *Maguire v. Commissioner of Int. Revenue*, 313 U. S. 1, 61 S. Ct. 789, 85 L. Ed. 1149. This rule, like many other rules of statutory construction, is inapplicable where there is no textual ambiguity. *United States v. Minken*, 350 U. S. 179, — S. Ct. —, 100 L. Ed. (Adv. p. 191). Tie-in sales do not, of course, and no contention is made that they do, come within the ban against exclusive outlets and tied houses.

Where the meaning of legislation is doubtful or obscure, resort may be had in its interpretation to the reports of congressional committees which have considered the matter. See *Wright v. Mountain Trust Bank*, 300 U. S. 440, 57 S. Ct. 556, 81 L. Ed. 736, 112 A. L. R. 1455, and authorities there cited. Constructing the Act strictly against the Government as we think we must do, and looking to the intent of the Congress as disclosed by the committee report from which we have quoted, we cannot say that the Act prohibited or was intended to prohibit tie-in sales.

The contemporaneous construction of a statute by an administrative agency charged with the duty of enforcement is entitled to respectful consideration. *Fox v. Standard Oil Co.*, 294 U. S. 87, 55 S. Ct. 323, 79 L. Ed. 780. Here we have the Alcohol and Tobacco Tax Division construing the Act in 1946 as prohibiting tie-in sales. But the Division had no such confidence then in its interpretation as to seek enforcement by sanctions. Instead, it sought stipulations. It confessed its doubt as to whether violations could be established through tie-in sales. It recognized the contention of members of the industry that tie-in sales were not prohibited. It sought to have the doubt resolved by an amendment to the Act bringing tie-in sales within the prohibited practices. The Congress did not see fit to grant the administrative request. Counsel for the Government say to us that the simple introduction of a bill to amend a statute, without any further proceedings thereon, "is without meaning for the purposes of statutory interpretation" citing *Order of Railway Conductors v. Swan*, 329 U. S. 520, 67 S. Ct. 405, 91 L. Ed. 471. A recognition of such a principle would not preclude us, in our "labors to discover the design" of the framers of the Act from seizing upon the expressed doubts of the Treasury Department as an aid to construction. The Division recognized that the language of § 5 was ambiguous by not attempting, in 1946, to apply the sanctions of the Act to those making tie-in sales. There was a further recognition of the ambiguity in the letter from the Acting Secretary to the President Pro Tempore of the Senate. The doubt which was then recognized by the Treasury Department and its Alcohol and Tobacco Tax Division has not been dispelled from our minds. We resolve that doubt in favor of the appellant and hold that the Act does not prohibit tie-in sales.

The opinion in *Distilled Brands v. Dunigan, supra*, gives to § 5 the "broader reading" of the administrative tribunal, and finds such to be in accord with "the construction put thereon by the Treasury Department since 1946". Since it does not appear from the opinion in the *Distilled Brands* case that the letter of the Acting Secretary was before the court, we assume that the court was entitled to find from the evidence before it that there had been a continuous and confident administrative construction consonant with its contention there and here asserted.

The appellant, in addition to its contention that tie-in sales are not prohibited by the Act, urges other grounds for reversal. Some of these, we think, have merit but the view which we have taken makes a determination of them unnecessary.

The order suspending the permit of appellant is set aside and

Reversed.

Judgment

Extract from the Minutes of April 6, 1956

No. 14914

MAGNOLIA LIQUOR COMPANY, INC.

versus

CLAUD B. COOPER, ASSISTANT REGIONAL COMMISSIONER,
ALCOHOL & TOBACCO TAX DIVISION, (DALLAS RE-
GION) INTERNAL REVENUE SERVICE

This cause came on to be heard on the petition of Magnolia Liquor Company, Inc., for appeal from an Administrative Order issued by the Assistant Regional Commissioner, Alcohol & Tobacco Tax Division, (Dallas Region) Internal Revenue Service, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the order of the said Assistant Regional Commissioner suspending the permit of appellant in this cause be, and the same is hereby, set aside and reversed.

In the United States Court of Appeals for the
Fifth Circuit

No. 14914

MAGNOLIA LIQUOR COMPANY, INC., APPELLANT

vs.

CLAUD B. COOPER, ASSISTANT REGIONAL COMMISSIONER,
ALCOHOL & TOBACCO TAX DIVISION (DALLAS RE-
GION) INTERNAL REVENUE SERVICE, APPELLEE

Order

(August 18, 1956)

Before BORAH and JONES, Circuit Judges, and
DAWKINS, District Judge.

BY THE COURT: By motion of the appellee herein it is shown that while the appeal in this Court was pending, Claud B. Cooper, as Assistant Regional Commissioner, Alcohol and Tobacco Tax Division (Dallas Region); Internal Revenue Service, retired from that office on January 31, 1954, and was succeeded by Joseph F. Black on February 1, 1954; and judgment of this Court was thereafter entered on April 6, 1956, without substitution of Joseph F. Black for Claud B. Cooper as a party to this appeal; and it appearing from said motion that it is desired that a petition for certiorari in the Supreme Court of the United States be filed, by reason whereof it is desired that said judgment be recalled and Joseph F. Black be substituted for Claud B. Cooper; and that such

other provisions be made by order as may be required; therefore, be it

Ordered, that the judgment of this Court in this cause bearing date April 6, 1956, be and it is hereby recalled;

That Joseph F. Black, Assistant Regional Commissioner, Alcohol and Tobacco Tax Division (Dallas Region), Internal Revenue Service, be and he is hereby substituted as a party appellee in this cause on appeal for and in lieu of Claud B. Cooper, nunc pro tunc as of February 1, 1954;

That the opinion of this Court bearing date April 6, 1956, be and it is hereby affirmed and approved as of the date thereof;

That judgment be entered pursuant to the aforesaid opinion against the said Joseph F. Black, Assistant Regional Commissioner as aforesaid, nunc pro tunc as of April 6, 1956;

That the time for the filing in the Supreme Court of the United States of a petition for a writ of certiorari in the above entitled cause shall be and hereby is extended to and including September 3, 1956;

That execution upon the judgment of this Court in this cause shall be and hereby is stayed until and including September 3, 1956, pending the filing of a petition in the Supreme Court for a writ of certiorari; and if said petition be so filed, the execution of said judgment shall automatically remain stayed until the Supreme Court shall act upon said petition for certiorari; and

That the suspension order of the aforesaid Assistant Regional Commissioner against Magnolia Liquor Company, Inc., dated November 30, 1953, directing the suspension of its wholesaler's basic permit issued under the Federal Alcohol Administration Act, shall not be enforced pending the time

for the filing of a petition for certiorari in the Supreme Court, nor thereafter unless and until the judgment of this Court to be entered herein shall be reversed by the Supreme Court.

Supreme Court of the United States

No. —, October Term, 1956

ASSISTANT REGIONAL COMMISSIONER, ALCOHOL AND TOBACCO TAX DIVISION (DALLAS REGION), INTERNAL REVENUE SERVICE, PETITIONER

vs.

MAGNOLIA LIQUOR COMPANY, INC.

Order Extending Time to File Petition for Writ of Certiorari

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 3, 1956.

(sgd) Hugo L. Black,
Associate Justice of the
Supreme Court of the United States.

Dated this 2nd day of July, 1956.

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OCTOBER TERM, 1956.

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FILED

SEP 22 1956

JOHN T. FEY, Clerk

No. [REDACTED] 14

**JOSEPH F. BLACK, ASSISTANT REGIONAL COM-
MISSIONER ALCOHOL AND TOBACCO TAX
DIVISION (DALLAS REGION), INTERNAL REV-
ENUE SERVICE,**

Petitioner,

versus

MAGNOLIA LIQUOR COMPANY, INC.,

**ANSWER TO PETITION FOR A WRIT OF CERTIO-
RARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT.**

**MOISE S. STEEG, JR.,
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313 Richards Building,
New Orleans 12, Louisiana,
Attorneys for Magnolia
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**LOUIS G. SHUSHAN,
Of Counsel.**

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 359.

**JOSEPH F. BLACK, ASSISTANT REGIONAL COM-
MISSIONER ALCOHOL AND TOBACCO TAX
DIVISION (DALLAS REGION), INTERNAL REV-
ENUE SERVICE,**

Petitioner,

versus

MAGNOLIA LIQUOR COMPANY, INC.,

**ANSWER TO PETITION FOR A WRIT OF CERTIO-
RARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT.**

MAGNOLIA LIQUOR CO., INC. prays that the ap-
plication for a Writ of Certiorari to review the judgment
of the United States Court of Appeals for the Fifth Cir-
cuit, entered in this matter, be denied for the reasons
hereinafter set forth:

QUESTION PRESENTED.

Whether Section 5(a) and 5(b) of the Federal Alcohol Administration Act¹ can be interpreted as prohibiting the practice of "tie-in sales" between a wholesaler and retailer of alcoholic beverages.

STATUTES INVOLVED.

This matter concerns an interpretation of Sections 5(a) and 5(b) of the FAA Act, but, in addition thereto the imposition of civil sanctions and criminal penalties as provided in the Act.

Section 5 of the Federal Alcohol Administration Act has been set forth in full in the application for writs. The penal Sections have not been discussed. Violation of 27 U.S.C. 205 may result in both civil penalties in the form of a revocation or suspension of a basic permit to operate as a wholesaler (27 U.S.C. 204), or criminal prosecution (27 U.S.C. 207).²

¹ 49 Stat. 977, 27 U.S.C. 205.

² The Civil procedure is outlined in Footnote (3), Page 4 of the petition. 27 U.S.C. 207 provides that a conviction for violation of the statute may result in penalty of \$1,000.00 for each offense. This statute is quoted in full in the Appendix.

STATEMENT OF THE CASE.

Proceedings were instituted against MAGNOLIA LIQUOR CO., INC., charging it with violation of Section

5 of the Act in requiring certain named customers to purchase gin, Seagram's 7-Crown blended whiskey, or cordials in order to obtain Johnny Walker Scotch whiskey or Seagram's V. O. Canadian whiskey, and certain record-keeping infractions. Sales so made are referred to as "tie-in sales". The examiner recommended a suspension of Magnolia's permit for 45 days. An appeal was taken to the Director of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, who affirmed the findings as to the tie-in sales violation and reversed the examiner on the infraction of the record keeping requirements. The Director reduced the period of suspension to 15 days. The Assistant Regional Commissioner issued a suspension order from which appeal was taken. The Court of Appeals for the Fifth Circuit reversed the decision of the Assistant Regional Commissioner and dismissed the charges.

MAGNOLIA LIQUOR CO., INC. is the exclusive wholesale distributor in New Orleans for Seagram Distillers Corporation. Of twenty-eight retail liquor dealers interviewed by a Special Investigator of the Alcohol and Tobacco Tax Division, eight were called as witnesses. Of these, seven gave testimony from which the Examiner found that they had bought plentiful items in order to get the scarce items. The Investigator testified that, in his effort to ascertain whether Magnolia Liquor Co., Inc. was tying V. O. with gin and other products, he picked out isolated invoices for the purpose of demonstrating a pattern. Some of the witnesses testified that they had to buy Seagram's 7-Crown whiskey or Seagram's gin to get V. O. or Johnny Walker. One witness said he was re-

quired to buy Seagram's gin in order to get 7-Crown. During the period involved, December, 1950, January, February and March, 1951, the said Magnolia Liquor Co., Inc. sold 7,067 cases of V. O., 29,049 cases of 7-Crown and 2,050 cases of Seagram's gin. The volume of these items in the so-called tie-in sales was 26 cases of V. O., 5 cases of Scotch, 64 $\frac{1}{4}$ cases of 7-Crown and 12 cases of gin.³

REASONS URGED FOR DENYING WRITS.

1. The decision in the Court below is not in conflict with the decision of the Court of Appeals for the Second Circuit in *Distilled Brands vs. Dunigan*, 222 Fed. 2d, 867, but augments it.
2. The decision of the Court below is correct.

I.

There is no conflict between the decision of the Fifth Circuit Court of Appeals in this case and the decision of the Court of Appeals for the Second Circuit in the *Distilled Brands* case. Any conflict between these two cases is more apparent than real. The *Distilled Brands* case held on the facts before it, that the tie-in sales committed were prohibited by Sections 5(a) and 5(b) of the Federal Alcohol Administration Act. In the *Magnolia* case the Fifth Circuit had before it *additional* relevant facts relat-

³ This is, with adoptive editing, the statement of the case, adopted by the Fifth Circuit Court of Appeals in its decision. *Magnolia Liquor Co., Inc. vs. Cooper*, 231 F.2d, 941, at Page 942.

ing to the statute itself, and the Court below found that the *Distilled Brands* case was correct—based upon the information before that Court—but that with the additional information available, a further examination of the statute was warranted, and a different result was proper.

The Court in the *Distilled Brands* case disposed of the statutory interpretation question relating to Section 5 of the Act, with these two brief comments:

"We agree with the position of the Division that tie-in sales do constitute a sufficient interference with competition to require prohibition within the regulatory scheme of the Federal Alcohol Administration Act, and that Section 5, 27, U.S.C., Section 205, actually covers such transactions"

"The broader reading given to Section 5 by the administrative tribunal below is in accordance with the construction put thereon by the Treasury Department since 1946. This construction is of considerable weight, particularly when it is so eminently reasonable in the light of the over-all purposes of this regulatory statute"

The entire decision of the Court below was devoted to a discussion of the statute involved: its language, its captions and its history, and with reference to the *Distilled Brands* decisions, the Court said:

"The opinion in *DISTILLED BRANDS v. DUNIGAN, SUPRA.* gives to Section 5 the 'broader reading' of the administrative tribunal, and finds such to be in accord with 'the construction put thereon by the Treasury Department since 1946'. Since it does not appear from the opinion in the *Distilled Brands*

case that the letter of the Acting Secretary was before the court, we assume that the court was entitled to find from the evidence before it that there had been a continuous and confident administrative construction consonant with its contention there and here asserted."

The *Distilled Brands* decision was predicated upon the legal proposition that there was a consistent and unequivocal construction of the Act by the Treasury Department, entitled to considerable weight. The additional information before the Court in this case conclusively showed that the administrative construction was neither confident nor consistent (as was assumed by the Court in the *Distilled Brands* case) and, therefore, the rationale of the *Distilled Brands* case was completely refuted.

II.

When the repeal of prohibition became effective, Congress was not in session. The regulation of the liquor industry was then accomplished by the Codes of Fair Competition, adopted under the provisions of the National Industrial Recovery Act. Section 5 of the Codes, relating to alcoholic beverages contained provisions for prohibited agreements by wholesalers from exacting or requiring that any retailer handle or sell only the products of a particular member of the industry. When the N.I.R.A. was declared unconstitutional, the Federal Alcohol Administration Act was passed and most of the practices outlawed by the Codes of Fair Competition were brought within the scope of the Federal Alcohol Ad-

ministration Act. Such was the express object and purpose of this legislation:

"The bill [Federal Alcohol Administration Act] embodies in statutory form so much of the former code system as the committee now deems appropriate and within the constitutional power of Congress to enact. In general, it may be said that the bill incorporates the greater part of the system of Federal control which was enforced by the Government under the codes." H. R. Rep. No. 1542, 74th Cong. 1st Sess. (1935); Senate Report No. 1215.

From this background emerged among other provisions, Section 5(a) and 5(b) of the FAA Act, prohibiting as the captions of the statute itself provide, "Tied House" and "Exclusive Outlet".

If we turn to the declarations of the Congress when the FAA Act was under discussion, we find that these are the definitions of the practices contemplated by Sections 5(a) and 5(b) of the Act:

SECTION 5(a): "TIED HOUSE—that is, a situation where a retailer had to take a certain quota of some private brand as a condition to being allowed to retail that brand;" or

SECTION 5(b): "EXCLUSIVE OUTLET—that is, a monopolistic control of that retail outlet to the absolute exclusion of all other brands."

In their sessions, the Congress discussed and defined the particular unfair trade practices which they proposed to strike down by Sections 5(a) and 5(b) of the FAA Act. Quotation of this language is found in the Appendix, *INFRA*.

"Tie-in sales", as defined in this case, were not contemplated.

However, during and after the last war, economic circumstances created shortages in certain lines of alcoholic beverages and a practice emerged whereby certain wholesalers required a retailer to purchase both plentiful and short items in order that the retailer could not deplete the stock of the short items by their purchases only, and ignore the other products sold by the wholesaler. This is the practice known as "tie-in sales"—a practice which this Court in *Federal Trade Commission vs. Gratz*⁵ held was not illegal *per se*:

"All questions of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell except in conjunction, such closely associated articles as ties and bagging. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect to his own business methods must be preserved."

In 1946 the Treasury Department issued rules to show cause, addressed to substantially all the wholesalers of the country (including Magnolia Liquor Co., Inc.). All of these show cause orders were dismissed by stipulation; none were brought to trial. In 1947 the Acting Secretary of the Treasury addressed a letter to the President *Pro tempore* of the Senate, outlining the circumstances relating to these stipulations and expressing the doubt of the

⁵ 253, U.S. 421, 40 Sup. Ct. 572 (1920).

Treasury Department as to whether Sections 5(a) and 5(b) prohibited tie-in sales:

"The Department reached the conclusion that such practices [tie in sales] violated the provisions of Sections 5(a) and 5(b) of the Act (U.S.C. title 27, secs. 205(a) and 205(b) where the transactions were of a nature to affect interstate or foreign commerce. *In the absence of a provision in the statute expressly dealing with 'tie in' sales, however, it was decided to institute proceedings for the revocation or suspension of the basic permits of suppliers instead of attempting criminal prosecutions. Such proceedings were instituted in numerous cases, with the result that many suppliers agreed in writing to discontinue such practices. This disposition of the cases was due to doubt on the part of the Department as to whether violations of the statute could be established through the 'tie-in' sales. It was contended by members of the industry that 'tie-in' sales were not within the purview of sections 5(a) and 5(b) and that those sections were designed to prevent the creation of exclusive outlets and tied houses only. In a view of the situation it is believed that the Act should be so amended as definitely to vest the Department with authority to act in such cases. It is proposed to accomplish this result by adding at the end of Section 5(c) a new clause as follows:*

"(c), by conditioning the purchase with the purchase of any other distilled spirits, wine or malt beverages; or;

"This proposed amendment has been tacked on to section 5(c) of the Act for the reason that the prohibitions of this section, unlike those of sections 5(a) and 5(b) run to transactions with any 'trade buyer',

which term as defined in the Act includes wholesaler and retail dealers." Cong. Record. November 17, 1947, p. 10690, dated Aug. 15, 1947. (Emphasis ours.)

On two occasions bills were introduced into Congress which would have expressly prohibited tie-in sales; neither measure passed.

From the date of the letter by the Treasury Department to the Senate and the rejection of the proposed legislation, the Treasury Department was silent on this question.

The proposed legislation would have added a third paragraph to Section 5 of the FAA Act and we collate for you the language of the statute as originally enacted and as proposed:

27 U.S.C.A. 205(a) and (b)

**205. Unfair competition
and unlawful practices**

It shall be unlawful for any person engaged in business as a . . . wholesaler, of distilled spirits, wine, or malt beverages.

(a) **Exclusive outlet.** To require, by agreement or otherwise, that a retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such person

Proposed Amendment to

27 U.S.C.A. 205 (c)

It shall be unlawful for any person engaged in business as a wholesaler of distilled spirits, wine or malt beverages.

(c) **Commercial Bribery.** To induce any trade buyer engaged in the sale of distilled spirits, wine or malt beverages to purchase any such products from such person;

to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce . . .

(b) **"Tied house"**. To induce through any of the following means any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce.

. . . (7) by requiring the retailer to take and dispose of a certain quota of any of such products; . . .

. . . or (3) by conditioning the purchase of any distilled spirits, wine or malt beverages upon, or "tying in" such purchase with the purchase of any other distilled spirits, wine or malt beverages.

The Treasury Department, the Second Circuit Court of Appeals, and the Court below concluded that Sections 5(a) and 5(b) of the Federal Alcohol Administration Act did not *expressly* prohibit the practice of "tie-in sales"; thus, the issue presented was the interpretation of Sections 5(a) and 5(b) of the FAA Act. The Court below, in finding that Sections 5(a) and 5(b) of the FAA Act did not prohibit tie-in sales, considered these elements of statute interpretation: the actual language of the statute, the captions to the applicable sections, the penal nature of the statute, its legislative history:

1. The Act does not expressly prohibit tie-in sales.
2. Tie-in sales were not among the practices included in the Codes and contemplated by the Congress when the FAA Act was adopted.
3. Although the Treasury Department originally advanced an interpretation to the effect that tie-in sales were contrary to the Act, it clearly abandoned this position:
 - a) All prosecutions were dismissed by stipulation, which stipulation in our case expressly provided that it should not prejudice the rights of Magnolia Liquor Co., Inc. in any subsequent proceedings. No other action was taken from 1946 to 1952.
 - b) It addressed a communication to the Congress, declaring to Congress and to all concerned that it had doubts as to the applicability of the statute.
 - c) It unsuccessfully sought additional legislation to clarify the point, using the precise language which the Department sought to read into Sections 5(a) and 5(b) of the Act.

4. Thus, there was no clear and confident administrative construction of the statute or course of action which would be entitled to "great weight" afforded this erroneous assumption by the Second Circuit in the *Distilled Brands* case.

5. An alleged violation of Sections 5(a) and 5(b) involves not only civil proceedings, as is this case, but likewise includes criminal responsibility. Such a statute is, therefore, penal in its nature and should be strictly construed.⁶

Considering these factors, the Court below resolved all doubt in the interpretation of this statute in favor of Magnolia Liquor Co., Inc. and against the Treasury Department and reversed the decision of the Acting Commissioner of Internal Revenue. This decision is manifestly correct.

OTHER CONTENTIONS.

We invite the attention of the Court to the following language in the opinion in this case:

"The appellant, in addition to its contention that tie-in sales are not prohibited by the Act, urges other grounds for reversal. Some of these, we think, have

⁶ United States v. Wiltberger, 5 Wheat. 76, 5 L.Ed. 37. See Tiffany v. Missouri National Bank, 18 Wall. 409, 21 L.Ed. 862; Providence Steam Engine Co. v. Hubbard, 101 U. S. 188, 25 L.Ed. 786. The Government throughout its argument (and the Court below as well) have continuously by-passed the criminal penalties involved under Section 7 of the F.A.A. Act. The choice of civil or criminal procedure, or even both, is left entirely within the discretion of the Treasury Department.

merit but the view which we have taken makes a determination of them unnecessary."

These contentions, as outlined by the Court below, are as follows:

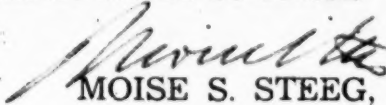
1. ~~That~~ tie-in sales have not been proved;
2. That the proof does not show a practice of tie-in sales "to such an extent as substantially to restrain or prevent transactions interstate or foreign commerce";
3. That there was no "willful" violation of the Act;
4. That the suspension of appellant's permit constituted a taking of property without due process of law;
5. That the regulation of trade practices between a wholesaler and retailers of alcoholic beverages violates the Twenty-first Amendment to the United States Constitution; and
6. The sanction imposed is excessive.

It is respectfully submitted that if the Court should disagree with the position taken above, that the matter should be remanded to the Court of Appeals so that all of the issues can be decided by that Court and the matter presented to the Supreme Court on one, and not on several occasions.

CONCLUSION.

The decision below is not in direct and express conflict with that of another Court of Appeals but is based upon the examination of additional facts which warrant the conclusion reached by the Court below, and its decision is correct as to the interpretation of the Federal Alcohol Administration Act.

It is, therefore, respectfully submitted that the petition for a Writ of Certiorari should be denied.


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CERTIFICATE.

I hereby certify that copies of this answer have been served on opposing counsel this 20 day of September, 1956.



APPENDIX.**1. 27 U.S.C. 207:****PENALTIES; JURISDICTION; COMPROMISE OF LIABILITY.**

The District Courts of the United States, and the United States court for any Territory, of the District where the offense is committed or threatened or of which the offender is an inhabitant or has his principal place of business, are hereby vested with jurisdiction of any suit brought by the Attorney General in the name of the United States, to prevent and restrain violations of any of the provisions of this chapter. Any person violating any of the provisions of section 203 or section 205 of this title shall be guilty of a misdemeanor and upon conviction thereof be fined not more than \$1,000 for each offense. The Secretary of the Treasury is authorized, with respect to any violation of this chapter, to compromise the liability arising with respect to such violation (1) upon payment of a sum not in excess of \$500 for each offense, to be collected by the Secretary and to be paid into the Treasury as miscellaneous receipts, and (2) in case of repetitious violations and in order to avoid multiplicity of criminal proceedings, upon agreement to a stipulation that the United States may, on its own motion upon five days' notice to the violator, cause a consent decree to be entered by any court of competent jurisdiction enjoining the repetition of such violation.

2. The following are excerpts from the several discussions of the provisions of Section 5 of the Federal Alcohol Administration Act in Congress:

HOUSE REPORT NO. 1542:

"Under the code system a voluntary code for the brewing industry (already in existence at the time of repeal as a result of 3.2 beer legislation of March 22, 1933) was approved by the President. At the same time, the President imposed codes upon the other alcoholic beverage industries, namely, the distillers, rectifiers, importers, wholesalers, and wine producers. By Executive order under the National Industrial Recovery Act the President established the Federal Alcohol Control Administration to administer these codes and certain related functions. *The bill embodies in statutory form so much of the former code system as the committee now deems appropriate and within the constitutional power of Congress to enact. In general, it may be said that the bill incorporates the greater part of the system of Federal control which was enforced by the Government under the codes.*"

SENATE REPORT NO. 1215:

"The bill embodies in statutory form so much of the former code system as the committee now deems appropriate and within the constitutional power of Congress to enact. In general, it may be said that except with respect to malt beverages the bill as amended by the committee incorporates the greater part of the system of Federal control which was enforced by the Government under the codes."

CONGRESSIONAL RECORD, VO. 79, NO. 152, P.
12270:

"Mr. Lewis, of Colorado. Mr. Chairman, this is a further restriction on the so-called 'tied house', which

is regulated under section 5(b) of this bill. Before prohibition, in our part of the country at least, one of the evils of the liquor traffic was that a retailer was required by the brewer or distiller to take a certain quota of beer or spirits of some private brand as a condition to being allowed to retail that brand. The temptation was often irresistible for the retailer to induce customers to buy drinks when they had already had quite enough. This was a very great evil, as I believe the members of the committee will concede. I think this is an important amendment to this bill. I hope the committee will accept the amendment."

HOUSE REPORT 8870—The Committee on Finance:

"The tied-house provisions, it should be noted, relate to the *acquisition by industry members of control over theretofore independent retail establishments* and do not prohibit industry members from continuing to operate retail outlets heretofore established by them and wholly owned and operated by them, nor the establishment by industry members of new retail outlets of such character."

Both committees reporting on HOUSE REPORT 8870 carefully explained the purposes of Section 5:

"These prohibited practices fall in two general categories, those relating to *monopolistic control* of retail outlets and those relating to labeling and advertising."

"The House Bill (Sec. 5) prohibited 2 classes of trade practices. The first class of these prohibited practices

were those which tended to produce monopolistic control of retail outlets, such as arrangements for *exclusive outlets*, creation of *tied houses*, commercial bribery, and sales on consignment with privilege of return. * * *

"The second class of unfair practices prohibited by the bill are those relating to false labeling and false advertising * * *"

The Ways and Means Committee said clearly:

"Three other types of practices which are closely related to, and have *constituted additional means of effecting, the 'tied house'* are also prohibited. These *practices are exclusive* purchase agreements with retailers (sec. 5(a)); commercial bribery of a trade buyer, or the offering or giving of any bonus, premium or compensation to the officers or employees of a trade buyer (sec. 5(c)); and deliveries to a trade buyer on consignment or conditional sales, or sales with the privilege of return, or sales on any basis other than a bona-fide sale (sec. 5(d))."

"The foregoing practices have in this industry constituted the principal abuses whereby interstate and foreign commerce have been restrained and *monopolistic control* has been accomplished or attempted. The most effective means of preventing monopolies and restraints of trade in this industry is by prohibiting such practices, thereby striking at the causes for restraints of trade and *monopolistic conditions* and dealing with such conditions in their incipiency. Furthermore, such abuses were so prevalent before prohibition that they were regarded in a large

measure as responsible for the evils which led to prohibition. (See Report of the National Commissioner on Law Observance and Enforcement (1931), H. Doc. No. 722, 71st Cong., 1st sess., p. 6' and Fosdick and Scott, Toward Liquor Control (1933), pp. 42-43.) The prohibition of these practices will, accordingly, not only *prevent monopoly* and restraint of interstate trade but will also tend to eliminate or mitigate certain incidental social evils, such as those which have necessarily followed the forced increase in alcoholic-beverage sales resulting from the 'tied-house'."

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JOHN T. FEY, Clerk

No. 14

In the Supreme Court of the United States

OCTOBER TERM, 1957

**JOSEPH F. BLACK, ASSISTANT REGIONAL COMMISSIONER,
ALCOHOL AND TOBACCO TAX DIVISION (DALLAS RE-
GION), INTERNAL REVENUE SERVICE, PETITIONER**

v.

MAGNOLIA LIQUOR COMPANY, INC.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

BRIEF FOR THE PETITIONER

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JOSEPH F. BLACK, ASSISTANT REGIONAL COMMISSIONER,
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v.

MAGNOLIA LIQUOR COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 188-197) is reported at 231 F. 2d 941.

JURISDICTION

The judgment of the court of appeals (R. 197) was entered on April 6, 1956. The time for petitioning for a writ of certiorari was extended by Mr. Justice

¹ The respondent in the court of appeals was Claud B. Cooper, petitioner's predecessor in office. By order of August 18, 1956 (R. 198-199), that court substituted petitioner for Mr. Cooper, *nunc pro tunc*, as of February 1, 1954.

Black, on July 2, 1956, to September 3, 1956 (R. 199-200). The petition for a writ of certiorari was filed on August 29, 1956, and was granted on October 22, 1956 (R. 200). 352 U. S. 877. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether Sections 5 (a) and 5 (b) (7) of the Federal Alcohol Administration Act, which prohibit a wholesaler of alcoholic beverages from requiring or inducing any retailer to purchase such beverages "to the exclusion in whole or in part" of beverages offered for sale by other persons, prohibit tie-in sales by wholesalers.

STATUTE INVOLVED

Section 5 of the Federal Alcohol Administration Act, 49 Stat. 977, 27 U. S. C. 205, provides in pertinent part:

UNFAIR COMPETITION AND UNLAWFUL PRACTICES

It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

(a) *Exclusive outlet.*

To require, by agreement or otherwise, that any retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale

by other persons in interstate or foreign commerce, if such requirement is made in the course of interstate or foreign commerce, or if such person engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce; or

(b) "*Tied house.*"

To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce: * * * or (7) by requiring the retailer to take and dispose of a certain quota of any of such products; * * *

STATEMENT

In February 1952, the Assistant Regional Commissioner of the Alcohol and Tobacco Tax Division,

Internal Revenue Service (then known as the District Supervisor) issued an order (R. 2-5) directing respondent (a liquor wholesaler) to show cause why its wholesaler's basic permit should not be suspended for having made tie-in sales of alcoholic beverages between December 1, 1950 and March 31, 1951, in alleged willful violation of Sections 5 (a) and 5 (b) of the Federal Alcohol Administration Act.²

After hearing, the examiner found that respondent had violated the Act by making such tie-in sales, and recommended that its permit be suspended for 45 days (R. 161-188). On appeal, the Director of the Division approved and affirmed (with certain modifications) the examiner's findings,³ but reduced the period of suspension to 15 days (R. 138-156), and the Assistant Regional Commissioner issued an order suspending respondent's permit for that period (R.

² Section 4 (e) of that Act authorizes the Secretary of the Treasury to suspend or revoke basic permits for willful violation of the Act. By Treasury Department orders and regulations, the Secretary has delegated his authority. Under the regulations (26 C. F. R., Part 200), suspension or revocation proceedings are decided initially by a hearing examiner. If the Assistant Regional Commissioner agrees with that decision, he enters an order in accordance therewith. If he disagrees, he may file a petition for review with the Director of the Alcohol and Tobacco Tax Division, who may affirm, modify or reverse the examiner's decision. (The respondent similarly has a right of appeal to the Director.) The Assistant Regional Commissioner then enters an order in conformity with the Director's decision.

³ The order to show cause also charged, and the examiner found, that respondent had knowingly and willfully made false entries in certain of its records. The Director reversed this finding, on the ground that such errors had been negligent rather than intentional (R. 152-155).

129-137). The court of appeals set the order aside on the ground that tie-in sales are not prohibited by the Act.

The pertinent facts, as found by the examiner (R. 161-175) and approved by the Director (R. 138, 145, 156), are as follows:

Respondent is the exclusive wholesale distributor for Seagram's products in the New Orleans area (R. 144, 162). It does an annual business of approximately \$6,000,000 (of which \$2,750,000 is done between December 1 and March 31), and has 2500-2600 retail customers, actual or potential (R. 162).

Between December 1, 1950 and March 31, 1951 (the period covered by the complaint), Johnny Walker Scotch and Seagram's V. O. Whiskey were in short supply (R. 163, 164-165), Seagram's Ancient Bottle Gin was a poor seller but plentiful (R. 171), and Seagram's 7-Crown Whiskey likewise was plentiful (R. 164). In order to increase its sales of Seagram's Ancient Bottle Gin and 7-Crown, respondent "adopted and executed a policy" (R. 164) of compelling its retail customers to purchase these brands, which they did not desire, in order to obtain V. O. or Johnny Walker, which they "desired and needed" (R. 164-166). Respondent's tie-in sales "affected adversely" the sales of competing brands, and therefore "excluded, in whole or in part, distilled spirits * * * offered for sale by other persons in interstate commerce" (R. 172); and those sales were made "to such

* Various retailers testified that respondent required them to purchase brands which they did not want in order to obtain

an extent as substantially to restrain or prevent transactions" in interstate or foreign commerce in distilled spirits (R. 174).

In holding that the Act does not prohibit tie-in sales, the court of appeals declared that, since the Act authorizes suspension or revocation of permits for violations, it is penal in nature and to be construed "strictly against the Government" (R. 195). The court also relied on the fact that the NRA Codes of Fair Competition for the alcoholic beverage industry did not prohibit tie-in sales; that the Act was adopted to close the regulatory gap which was created when the Code system was held unconstitutional; and that the House Committee Report on the Act stated that it "embodies in statutory form so much of the former code system as the committee now deems appropriate and within the constitutional power of Congress to enact" (R. 193). The court noted the Government's contention that, since 1946, the Treasury Department had construed the Act as forbidding tie-in sales, but found that contention unpersuasive because of a 1947 letter by the Secretary which, in proposing legislation that would specifically have outlawed tie-in sales, indicated that in 1946 the Department had had "doubt" whether violations of the Act could be established by showing tie-in sales (R. 191, 195-196). The court distinguished *Distilled Brands v. Dunigan*, 222 F. 2d 867, where the Court of Appeals held that the Act prohibited tie-in sales if those they needed (*e. g.*, R. 20, 21, 23-24, 34, 40, 49-50, 61, 64); and that, absent respondent's requirement, they would not have taken any of the "tied product" (R. 41, 43, 47, 50) or would have bought a competitor's brand instead (R. 24, 61).

peals for the Second Circuit had held that the Act does prohibit tie-in sales, on the ground that the 1947 letter of the Secretary had not been called to that court's attention (R. 196).⁵

SUMMARY OF ARGUMENT

The court of appeals held that, since the Federal Alcoholic Administration Act authorizes suspension, revocation or annulment of permits for willful violations, its substantive provisions are to be regarded as penal and therefore are to be strictly construed. But a proceeding to suspend the privilege of engaging in a business because of noncompliance with the applicable statutory standards is remedial rather than penal. *Helvering v. Mitchell*, 303 U. S. 391, 399. Moreover, regulatory legislation is not to be strictly construed merely because its violation "may be the basis of either civil proceedings of a preventative or remedial nature or of punitive proceedings, or perhaps both." *Securities & Exchange Commission v. Joiner Corp.*, 320 U. S. 344, 353. A regulatory statute such as this "should be given hospitable scope" (*Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 391).

A. Section 5 (a) and 5 (b) (7) of the Act prohibit wholesalers of alcoholic beverages from requiring or inducing any retailer to purchase their products "*to the exclusion in whole or in part of [products] sold or offered for sale by other persons * * **" (emphasis added). A wholesaler who conditions the sale of wanted products upon the simultaneous purchase of

⁵ In view of its decision on the statutory question, the court below found it unnecessary to reach other grounds for reversal urged by respondent (R. 196-197).

unwanted products "requires" or "induces" the retailer to purchase the latter, to the exclusion "in part" of products sold by other wholesalers. The record shows that respondent's tie-in sales have coerced buyers into accepting products which they would not otherwise have purchased, and have excluded other sellers of the tied product, *pro tanto*, from the market. See *Distilled Brands v. Dunigan*, 222 F. 2d 867, 869-870 (C. A. 2).

B. Section 5 of the Act, which contains the statutory provisions regulating "Unfair Competition and Unlawful Practices," was based in large measure upon the provisions of the prior NRA Codes of Fair Competition for the alcoholic beverage industry, which had prohibited various "unfair methods of competition." However, Congress did not merely reenact those of the code provisions which it "deem[ed] appropriate" (as the court of appeals apparently concluded), but made a number of important additions and changes which substantially broadened the code prohibitions against unfair competitive practices. In addition, the Act, for the first time, specifically injected into the regulatory scheme, as an essential element of violation, the competitive effect of the prohibited practices, namely, whether their effect was to exclude "in whole or in part" the products of competing sellers.

The legislative history shows that Congress intended to prohibit those practices "which tended to produce monopolistic control of retail outlets" (S. Rep. No. 1215, 74th Cong., 1st sess., p. 6), and to "prevent * * * monopolies and restraints of trade" in the liquor in-

dustry by striking at the causes "in their incipency." (H. Rep. No. 1542, 74th Cong., 1st sess., p. 11). The restrictive practices condemned in Section 5 "are analogous to those prohibited by the antitrust laws." *Ib.*, p. 12. Tying arrangements are a classic example of practices "prohibited by the antitrust laws" which this Court repeatedly has condemned. *International Salt Co. v. United States*, 332 U. S. 392; *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 156-159.

"Tying agreements serve hardly any purpose beyond the suppression of competition. * * * Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public." *Standard Oil Co. v. United States*, 337 U. S. 293, 305-306. Requirements contracts under which a retailer is required to purchase his entire supply of alcoholic beverages from a single wholesaler are specifically prohibited by Section 5 (a) of the Act. It would indeed be anomalous if Congress prohibited requirements contracts, which "may well be of economic advantage" to the public, while at the same time permitting wholesalers to use tie-in agreements, which have as their sole purpose "the suppression of competition."

C. Since at least 1946, the Treasury Department has construed Sections 5 (a) and 5 (b) (7) as prohibiting tie-in sales. This settled administrative construction by the agency which enforces the Act is entitled to great weight. The fact that in 1947 the Government sought clarifying legislation to make the Act explicitly applicable to tie-in sales neither lessens the weight to

which the settled construction is entitled, nor justifies any inference that the Act as written does not cover such sales.

ARGUMENT

SECTIONS 5 (a) AND 5 (b) (7) OF THE FEDERAL ALCOHOL ADMINISTRATION ACT PROHIBIT TIE-IN SALES OF ALCOHOLIC BEVERAGES BY WHOLESALERS TO RETAILERS

In holding that the Act does not prohibit tie-in sales, the court of appeals noted that the NRA Codes of Fair Competition for the alcoholic beverage industry had not outlawed such sales, and that the House Committee Report on the Act had stated that it "embodies in statutory form so much of the former code system as the committee now deems appropriate * * *." The court also rejected the settled administrative construction of the Act as covering tie-in sales, on the ground that the agency had expressed "doubt" as to the correctness of that interpretation. We shall show, however, that the specific language of Sections 5 (a) and 5 (b) (7), which the court did not consider, is broad enough to cover tie-in sales; that, contrary to the view of the court below, the Act substantially broadened the Code's regulatory provisions in a number of significant respects; that the legislative history of the Act reflects a Congressional purpose to prohibit restrictive practices in the alcoholic beverage industry which are "analogous to those prohibited by the anti-trust laws" and "tended to produce monopolistic control of retail outlets"—a category which includes tie-in sales; and that the court of appeals failed to give proper weight to the settled administrative con-

struction of the Act by the agency charged with its enforcement.

Prior to discussing these issues, however, we think it important to point out what we believe to be a threshold error by the court below—one which improperly colored its entire approach to the problem of statutory construction here involved.

The court held that since the Act authorizes suspension, revocation or annulment of permits for willful violations, its substantive provisions are to be regarded as penal and therefore are to be strictly construed. But, contrary to the court's view that "[a] statute which authorizes the sanction of business cessation is indeed penal" (R. 195), it is well settled that a proceeding to suspend the privilege of engaging in a business because of non-compliance with the applicable statutory standards is remedial rather than penal. *Helvering v. Mitchell*, 303 U. S. 391, 399; *Cella v. United States*, 208 F. 2d 783, 789 (C. A. 7), certiorari denied, 347 U. S. 1016 (suspension of registration as livestock dealer); *Board of Trade of City of Chicago v. Wallace*, 67 F. 2d 402, 407 (C. A. 7), certiorari denied, 291 U. S. 680 (same); *Wright v. Securities & Exchange Commission*, 112 F. 2d 89, 94 (C. A. 2) (expulsion from stock exchange). Regulatory legislation is not to be strictly construed merely because its violation "may be the basis of * * * civil proceedings of a preventive or remedial nature * * *." *Securities & Exchange Commission v. Joiner Corp.*, 320 U. S. 344, 353. The correct rule is that the courts "will interpret the text so far as the meaning of the words

fairly permits so as to carry out in particular cases the generally expressed legislative policy." *Id.*, p. 351. A remedial statute such as this, which deals with "one of the most sensitive national problems" (*United States v. Hutcheson*, 312 U. S. 219, 235), "reveals a definite attitude on the part of Congress which should be given hospitable scope" (*Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 391).

The *Joiner* case answers respondent's further contention (Br. in Op., p. 13) that, since violation of Sections 5 (a) and 5 (b) may also involve possible criminal proceedings under Section 7 of the Act, the statute is "penal in its nature and should be strictly construed." The same argument was made and rejected in *Joiner*, where it was unsuccessfully "urged that we must interpret with strictness the scope of this Act [Securities Act of 1933] because violations of it are crimes," and "may be the basis of either civil * * * or of punitive proceedings, or perhaps both" (*Joiner* case, *supra*, 320 U. S. at p. 353).

In any event, the rule of strict construction does not require that legislation be given "the 'narrowest meaning.' It is sufficient if the words are given their fair meaning in accord with the evident intent of Congress." *United States v. Raynor*, 302 U. S. 540, 552; and see *United States v. Bramblett*, 348 U. S. 503, 509-510.

A. THE LANGUAGE OF SECTION 5 (a) AND 5 (b) (7) COVERS TIE-IN SALES, SINCE THEY RESULT IN "THE EXCLUSION * * * IN PART" OF PRODUCTS SOLD OR OFFERED FOR SALE BY OTHER PERSONS

Section 5 (a) of the Act makes it

unlawful for any person engaged in business as a * * * wholesaler [of alcoholic beverages] * * * [t]o require, by agreement or otherwise, that any retailer * * * purchase any such products from such person *to the exclusion* in whole or *in part* of [products] sold or offered for sale by other persons * * *. [Emphasis added.]

Section 5 (b) (7) forbids a wholesaler

[t]o induce * * * any retailer * * * to purchase any such products from such person *to the exclusion* in whole or *in part* of [products] sold or offered for sale by other persons * * *. (7) by requiring the retailer to take and dispose of a certain quota of any of such products * * *. [Emphasis added.]

We submit that a wholesaler of alcoholic beverages who conditions the sale of wanted products upon the simultaneous purchase of unwanted ones "requires" the retailer to purchase the latter, to the exclusion "in part" of such products "sold or offered for sale by other" wholesalers, in violation of Section 5 (a). The "restraint" of such tie-in sales "on commerce is two-fold: The buyer is coerced into accepting a product which he would otherwise not have purchased; and other sellers of the tied-in products are to that extent excluded from the market." *Distilled Brands v. Duni-gan*, 222 F.2d 867, 869 (C. A. 2).

The record supports the finding that both coercion of buyers and exclusion of other sellers resulted from respondent's tie-in sales. Thus, a retailer testified that, if it had not been for such practices, he would not have purchased respondent's gin because "I had too much on hand already" (R. 41); another stated that the gin he had been compelled to buy on a tied basis was still on the shelves (R. 38). Two retail dealers testified that, had it not been for respondent's tie-in policy of requiring them to purchase its gin, they would have purchased gin sold by other wholesalers (R. 35, 61). Another testified that if respondent had not required him to buy Cinzano vermouth in order to obtain Johnny Walker Scotch, "I would have bought other vermouth that sell" (R. 24).

Similarly, respondent's tie-in sales required retailers "to take and dispose of a certain quota" of alcoholic beverages, in violation of Section 5 (b) (7). An example was a retailer who "couldn't get" a case of Johnny Walker for "a very good customer" "unless I bought a case of cordials" (R. 21); who, in order to obtain V. O., had to buy 7-Crown in the ratio of five cases of the latter to one of the former (R. 22); and who bought ten cases of Seagram's gin, a "very slow seller" which was not in demand in his trade, in order to obtain 25 cases of V. O. (*ibid.*).⁶ By imposing such quotas upon retailers, respondent "induced" them to purchase alcoholic beverages to the exclusion of

⁶ It was no less a "quota" because it was imposed as a condition to obtaining a different product, rather than as a condition to obtaining a particular product at all, *i. e.*, allowing a retailer to purchase a particular liquor only if he accepted a certain amount.

other brands which were offered for sale by respondent's competitors.

"Both subsections explicitly state that the forbidden practices need not result in complete exclusion of competitive sellers, but that partial interference will suffice." *Distilled Brands case supra*, at p. 869. The vice of a tie-in sale is that "[b]y conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stress of the open market." *Times-Picayune Company v. United States*, 345 U. S. 594, 605. The inevitable effect of respondent's tie-in sales was that competing wholesalers of the tied products, whose brands respondent's retail customers would have preferred to purchase if they had freedom of choice to do so, were precluded from competing for such business on an equal footing. Necessarily, such tie-in sales excluded "in part" the brand "sold or offered for sale" by the other wholesalers, within the meaning of Sections 5 (a) and 5 (b) (7).

B. THE LEGISLATIVE HISTORY AND BACKGROUND OF THE ACT SUPPORT THE VIEW THAT IT PROHIBITS TIE-IN SALES

While Congress retained in the Act those provisions of the NRA Codes of Fair Competition for the alcoholic beverage industry which it "deem[ed] appropriate," it also substantially broadened the Code provisions with respect to anti-competitive practices in a number of significant respects. Particularly, as we shall show, Congress intended to prohibit restrictive

practices in the industry "analogous to those prohibited by the antitrust laws," which "tended to produce monopolistic control of retail outlets." While the tie-in sale was not one of the particular restrictive practices upon which the Congress focused, we believe that it was the kind of anti-competitive practice which Congress intended to block in its "incipiency."

A brief description of the background of the Act will be helpful in showing its relationship to the codes, and the purpose which Congress sought to achieve by the provisions of Section 5.

When the Twenty-first Amendment, repealing Prohibition, became effective on December 5, 1933, Congress was not in session. Since existing legislation was inadequate to deal with the many regulatory problems posed by the newly revived industry, codes of fair competition, pursuant to the National Industrial Recovery Act, were quickly promulgated for all but one branch of the industry.⁷ These codes, which attempted to meet "many" of the problems faced by the industry, were deemed to be of a "temporary character," since it was expected that Congress would shortly "enact appropriation legislation." H. Rep. No. 1542, 74th Cong., 1st sess., pp. 3-4; see Art I, Wholesalers Code, Revision 2, April 19, 1935. In fact, however, Congress did not pass legislation until August, 1935, three months after this Court invali-

⁷ Codes were adopted for distillers on November 26, 1933; for importers on December 2, 1933; for brewers on December 4, 1933; for wholesalers and rectifiers on December 9, 1933; and for the wine industry on December 27, 1933. No code was ever prescribed for retailers.

dated the National Industrial Recovery Act in *Schechter Poultry Corp. v. United States*, 295 U. S. 495.

Article V of the Wholesalers Code, a typical code provision, contained a number of prohibitory provisions directed against "unfair methods of competition."^{*} These provisions, insofar as they governed the relationship between wholesalers and retailers, were primarily addressed to unfair competitive practices affecting retailers who sell liquor for consumption on the premises. For example, the code provision regulating "Control of Retail Outlets" (Art. V, Sec. 8) make it an unfair practice for a wholesaler to "hold any interest in any license" to sell liquor "at retail for consumption on the premises," to "participate or engage in" such retail sales; to "control, employ, manage, or financially assist" an "on the premises" retailer, or, generally, to "hold any interest" in premises where such sales were made for immediate consumption. The Code also prohibited "Exclusive Outlets" (Art. V, Sec. 11), forbidding a wholesaler to "exact or require" any "trade buyer" selling "at retail for consumption on the premises" to "handle or sell only" the wholesaler's products. In the Distillers, Rectifiers and Wine Codes, the "Control of Retail Outlets" and "Exclusive Outlet" provisions were also limited to "on the premises" retailers. The Codes, however, did not prohibit wholesalers from controlling, or entering into exclusive dealing arrangements with, retailers who sold packaged goods for off-premises consumption.

^{*} Article V is set forth in Appendix A, *infra*, pp. 27-30.

Section 5 of the Act contains the statutory provisions regulating "Unfair Competition and Unlawful Practices." While these provisions are based in large measure upon the prior provisions of the Codes, Congress did not merely reenact those of the Code provisions which it "deem[ed] appropriate," as the court below apparently concluded. On the contrary, it made a number of important additions and changes which substantially broadened the prohibitions which the Codes contained.⁹

Thus, while the code provisions relating to "Exclusive Outlets" and "Control of Retail Outlets" applied only to "on the premises" retailer, Section 5 applies to all retailers, including those selling packaged goods. Furthermore, the Act, for the first time, specifically injected into the regulatory scheme, as an essential element of violation, the competitive effect of the prohibited practices. While the Code only prohibited a wholesaler from requiring a retailer to handle its products exclusively, Section 5 (a) of the Act prohibits a wholesaler from requiring a retailer to purchase alcoholic beverages from him "to the exclusion in whole or in part of [products] sold or offered for sale by other persons" (emphasis added). Similarly, Section 5 (b) (7), which had no counterpart in the Code, prohibits a wholesaler from "induc[ing]" a retailer to purchase the wholesaler's products

⁹ In some other respects, the Act is narrower than the Codes. For example, although the Brewers Code (Revision 1, August 1, 1934) contained detailed regulatory provisions for that industry, the only provisions of the Act applicable to brewers is Section 5, and that section applies to interstate sales only to the extent that intrastate sales are similarly regulated under state law.

where such purchase will exclude "in whole or in part" the products of other wholesalers. The same emphasis on the competitive effect of the practices occurs in Section 5 (c), which forbids commercial bribery, bonus payments and similar practices if they "induce * * * any trade buyer" to purchase a supplier's products "to the exclusion in whole or in part" of products sold by others; and in Section 8, which prohibits any person from holding interlocking directorates in two or more distillers, rectifiers or blenders unless he makes due showing that such interlocks "will not substantially restrain or prevent competition in interstate or foreign commerce in distilled spirits."¹⁰

¹⁰ The Act broadened the Code prohibitions in a number of other respects. For example, some of the Codes contained no prohibition on suppliers furnishing retailers with signs (*e. g.*, Distillers, Rectifiers, Importers); others permitted it up to an annual value of \$100 (Wholesalers Code, Art. VI, Sec. 6 (d) (1); Wine Code, Art. V, Sec. 6 (d) (1); Brewers Code Art. IV, Sec. 6 (d)). Section 5 (b) (3) of the Act, however, prohibits wholesalers (and others) from furnishing retailers with signs unless authorized by Treasury Regulations. The latter permit the furnishing of signs of a value not exceeding \$30.00 for distilled spirits, and not exceeding \$10.00 for wine and malt beverages. 27 C. F. R. § 6.23, 623a.

Although the Codes prohibited wholesalers from making conditional sales of distilled spirits (*e. g.*, Wholesalers Code, Art. V, Sec. 4), Section 5 (d) of the Act extended this prohibition to make it also unlawful for the buyer to enter into conditional sales contracts.

The Code provisions relating to misbranding were primarily negative (Wholesalers Code, Art. V, Sec. 2). The Act, however, affirmatively requires disclosure on the label of "adequate information" as to the identity, quality and alcoholic content of the product (Sec. 5 (e)). Similarly, while the Codes merely prohibited the publication or dissemination of "any false advertisement" (Wholesalers Code, Art. V, Sec. 1), the Act prescribes affirmative standards for the advertising of alcoholic beverages (Sec. 5 (f)).

The reason for this Congressional emphasis upon the competitive impact of the prohibited practices is expressed in the legislative history. Congress intended, by Section 5, to prohibit those practices "which tended to produce monopolistic control of retail outlets" (S. Rep. No. 1215, 74th Cong., 1st sess., p. 6), and to "prevent * * * monopolies and restraints of trade" in the liquor industry by striking at their causes "in their incipency." H. Rep. No. 1542, 74th Cong., 1st sess., p. 11. The restrictive practices condemned in Section 5 "are analogous to those prohibited by the antitrust laws." *Id.*, p. 12.

Tying arrangements are a classic example of practices "prohibited by the antitrust laws". This Court repeatedly has condemned them in a variety of situations. *International Salt Company v. United States*, 332 U. S. 392 (tying restrictions in leases); *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 156-159 (block-booking); *Mercoïd Corp. v. Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680 (licensing agreements). See, also, *Landis Machinery Co. v. Chaso Tool Co.*, 141 F. 2d 800 (C. A. 6), certiorari denied, 323 U. S. 720 (full line forcing).

"Tying agreements serve hardly any purpose beyond the suppression of competition. * * * Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming pub-

lic." *Standard Oil Co. v. United States*, 337 U. S. 293, 305-306. Concededly, requirements contracts under which a retailer is required to purchase his entire supply of alcoholic beverages from a single wholesaler are specifically prohibited by Section 5 (a) of the Act. It would be anomalous if Congress prohibited requirements contracts, which "may well be of economic advantage" to the public, while at the same time permitting wholesalers to use tie-in agreements whose sole purpose is "the suppression of competition." In a statute which provides for comprehensive and detailed control of virtually all aspects of the business, Congress cannot be deemed to have left such a loophole as that for which respondent contends.

Like the tie-in sales which were condemned as *per se* violations of Section 1 of the Sherman Act in *International Salt Co. v. United States*, 332 U. S. 392, 396, the tendency of respondent's tie-in sales "to accomplishment of monopoly seems obvious." And, as Congress stated, Section 5 was intended to prohibit those practices "which tended to produce monopolistic control of retail outlets." S. Rep. No. 1215, 74th Cong., 1st sess., p. 6. Furthermore, tie-in sales are an obvious step in the direction of exclusive outlets and tied houses, restrictive practices which Congress sought to block "in their incipency." We submit that Congress plainly intended to cover tie-in agreements when it prohibited a wholesaler from requiring, or inducing,

a retailer to purchase distilled spirits "to the exclusion in whole or in part" of such products sold by its competitors.¹¹

C. THE SETTLED ADMINISTRATIVE CONSTRUCTION OF THE ACT SUPPORTS THE VIEW THAT IT PROHIBITS TIE-IN SALES

Since at least 1946, the Treasury Department has construed Sections 5 (a) and 5 (b) as prohibiting tie-in sales (R. 5-8).¹² This settled administrative interpretation of the Act by the agency charged with its enforcement is, under established canons of statutory

¹¹ In holding that Sections 5 (a) and 5 (b) of the Act do not cover tie-in sales, the court of appeals noted (R. 195) that these subsections contain the respective headings of "Exclusive outlet" and "Tied house," and that "[t]ie-in sales do not * * * come within the ban against exclusive outlets and tied houses." But such section headings, which have not been "the subject of special consideration by the legislature," deserve "little weight." *Hadden v. The Collector*, 5 Wall. 107, 110. They are "but a short-hand reference" to the general subject matter involved, and they are "not meant to take the place of the detailed provisions of the text." *Railroad Trainmen v. B. & O. R. Co.*, 331 U. S. 519, 528, 529. Where, as here, the "text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner * * * matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles." *Ibid.*

¹² In that year, the Department, having concluded that tie-in sales violated the Act, instituted 146 proceedings (including one against respondent) to suspend or revoke wholesalers' basic permits for making such sales, all of which were settled by stipulation. Annual Report, Commissioner of Internal Revenue, Fiscal Year 1946, p. 45; *Id.*, fiscal year 1950, p. 51; see Appendix B, *infra*, p. 32. The lack of any administrative interpretation prior to that time is explained by the fact that tie-in sales in the liquor industry ordinarily do not become a serious problem except in times of scarcity. "During the period of war-time scarcities the practice of 'tie-in' sales grew up and flourished in the liquor industry." Appendix B, *infra*, p. 31.

construction, entitled to great weight,¹³ "particularly when it is so eminently reasonable in the light of the over-all purposes of this regulatory statute." *Distilled Brands v. Dunigan*, 222 F. 2d 867, 870 (C. A. 2).

The court of appeals, however, found this administrative construction unpersuasive because of a 1947 letter by the Acting Secretary of the Treasury which, in proposing legislation that would have specifically outlawed tie-in sales, stated that the Department had settled proceedings instituted in 1946 against wholesalers charged with tie-in sales because of its "doubt" as to "whether violations of the statute could be established through the 'tie-in' sales" (R. 191).¹⁴ As the letter shows, however, the Department's "doubt" was not as to the correctness of its interpretation, but as to whether, in the light of the contention of industry members that tie-in sales were not covered by the Act, the Act ultimately would be held to cover tie-in sales. Furthermore, in both his 1946 and 1947 reports to the

The Alcohol Tax Division continued its program against tie-in sales in 1947. Annual Report, Commission of Internal Revenue, Fiscal Year 1947, p. 49. In 1950, the Division completed its investigation of post-war tie-in sales. *Id.*, Fiscal Year 1950, pp. 51-52. Further scarcities of alcoholic beverages developed at the time of the Korean emergency. In 1951, the Division moved informally against such practices (*id.*, Fiscal Year 1951, p. 60). In 1952, it instituted three administrative proceedings to suspend or revoke wholesalers' basic permits for engaging in tie-in sales: the instant case, the *Distilled Brands* case and a case that was settled by stipulation. *Id.*, Fiscal Year 1952, p. 16.

¹³ *United States v. American Trucking Ass'ns.*, 310 U. S. 534, 549; *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, 131; *Unemployment Compensation Commission v. Aragon*, 329 U. S. 143, 153-154.

¹⁴ The letter is set forth in Appendix B, *infra*, pp. 31-36.

Secretary of the Treasury, the Commissioner of Internal Revenue (under whose jurisdiction the Alcohol Tax Division operated) stated his view that the Act outlaws tie-in sales. Annual Report, Commissioner of Internal Revenue, Fiscal Year 1946, p. 45; *id.*, Fiscal Year 1947, p. 49.

The fact that the cases were settled by stipulation,¹⁵ instead of proceeding to trial, does not indicate, as the court below stated (R. 196), that the Treasury Department "doubted" the correctness of the statutory theory upon which the cases were based. Settlement of administrative proceedings by stipulation, rather than by going through a protracted hearing, is a well established and desirable practice, which is specifically provided for in Section 5 (b) of the Administrative Procedure Act, 5 U. S. C. 1004. See, also, Davis, *Administrative Law*, (1951) pp. 152-155.

The fact that the Government sought clarifying legislation to make the Act explicitly applicable to tie-in sales neither lessens the weight to which the settled administrative interpretation is entitled, nor justifies any inference that the Act as written does not cover such sales. This Court has refused to "draw the inference * * * that an agency admits that it is acting upon a wrong construction by seeking ratifica-

¹⁵ The stipulation provided that proceedings against the respondent, charging violations of Sections 5 (a) and 5 (b) through tie-in sales (R. 7-8), would be dismissed on condition, *inter alia*, that respondent agreed "hereafter not to violate Sections 5 (a) and/or (b) of the Federal Alcohol Administration Act" (R. 9).

tion from Congress," and has refused to hold that "a request for and failure to get in a single session of Congress clarifying legislation on a genuinely debatable point of agency procedure admits weakness in the agency's contentions." *Wong Yang Sung v. McGrath*, 339 U. S. 33, 47. No hearings were held on the Department's bill, or on similar bills subsequently introduced without Treasury support.¹⁶ The simple introduction of a bill to amend a statute, without any further proceeding thereon,¹⁷ "is without meaning for purposes of statutory interpretation" (*Order of Railway Conductors v. Swan*, 329 U. S. 520, 529), particularly where, as here, it was merely a "clarifying" amendment (*United States v. Turley*, 352 U. S. 407, 415, note 14).

The proposed legislation, moreover, was in no event inconsistent with the view that Sections 5 (a) and 5 (b) already prohibited tie-in sales between wholesalers and retailers. For in addition to clarifying the Act to make explicit the existing prohibition on such sales, the bills also would have extended the prohibition to tie-in sales between importers and distillers, on the one hand, and wholesalers on the other. See *infra*, p. 33. At present, the Act bans only tie-in sales between wholesalers and retailers.

¹⁶ H. R. 3248, 81st Cong., 1st sess., March 4, 1949; H. R. 7600, 82d Cong., 2d sess., April 25, 1952.

¹⁷ The draft of the Treasury bill was referred to the Senate Committee on Finance. 93 Cong. Rec. 10,570. The other two bills were referred to the House Committee on Interstate and Foreign Commerce. 95 Cong. Rec. 1896; 98 Cong. Rec. 4446. No further proceedings were had on any of the bills.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to that court for further proceedings.

Respectfully submitted.

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AUGUST 1957.

APPENDIX A

Code of Fair Competition for the Alcoholic Beverage Wholesale Industry, as amended to April 19, 1935:

* * * * *

ARTICLE V--UNFAIR METHODS OF COMPETITION (EXCLUDING PRODUCTS OF THE BREWING INDUSTRY)

The following practices constitute unfair methods of competition and shall not be engaged in with respect to alcoholic beverages by any member of the industry. Such practices shall not apply to the distribution of the products of the brewing industry.

SECTION 1. *False Advertising*.—To publish or disseminate in any manner any false advertisement of any alcoholic beverage. An advertisement shall be deemed to be false if it is untrue in any particular, or if directly or by ambiguity, omission, or inference, it tends to create a misleading impression.

SEC. 2. *Misbranding*.—To sell or otherwise introduce into commerce any alcoholic beverages that are misbranded, unless the member of the industry can establish a guaranty valid under regulations prescribed by the Administration. Alcoholic beverages shall be deemed to be misbranded—

(a) *Food and Drugs Act Requirements*.—If they are misbranded within the meaning of the Federal Food and Drugs Act and the member of the industry cannot establish a guaranty valid under Section 9 of the said Act.

(b) *Standards of Fill*.—If their container is so made, formed, or filled as to mislead the purchaser, or its contents fall below the standard of fill prescribed by regulations of the Administration.

(c) *Standards of Identity.*—If they purport to be or are represented as alcoholic beverages for which a definition of identity has been prescribed by regulations of the Administration, and they fail to conform to the definition.

(d) *Standards of Quality.*—If they purport to be or are represented as alcoholic beverages for which standards of quality have been prescribed by regulations of the Administration, and (1) fail to state on the label, if so required by the regulations, their standard of quality in such terms as the regulations specify, or (2) fall below the standard stated on the label.

(e) *Label Requirements.*—If in package form and they fail to bear a label conforming to such requirements as the Administration may by regulation prescribe. Regulations for the purposes of this subsection shall be prescribed by the Administration but only after due notice and opportunity for hearing to the members of the industry.

SEC. 3. *Commercial Bribery.*—To give or permit to be given money or anything of substantial value for the purpose of influencing persons (a) to purchase alcoholic beverages of a particular brand or from a particular person, or (b) to refrain from purchasing from or dealing with particular persons.

SEC. 4. *Consignment.*—To enter into any agreement, except for export, for the shipment or delivery of alcoholic beverages on consignment, or to sell alcoholic beverages conditionally or with a privilege of return, or on any basis other than a bona fide outright sale, except pursuant to regulations prescribed by the Administration.

SEC. 5. *Advertising and distribution service.*—(a) To pay, credit, or otherwise compensate a trade buyer for any advertising, display, or distribution service furnished by a trade buyer for or on behalf of the member of the industry, or to furnish any advertising, display,

or distribution service to or on behalf of a trade buyer; except that this section shall not prevent members of the industry from—

(1) Advertising their products and in connection with the advertisement setting forth the names and addresses of wholesale and retail establishments where such products may be obtained; or

(2) Furnishing to trade buyers signs advertising only the industry member or his products.

(b) Payments and allowances for special advertising or distribution service rendered within thirty days from the effective date of this amendatory section pursuant to contracts on file with the Code Authority on the effective date of this amendatory section, and at the time of filing lawful under this Code and applicable State or other law, shall not be regarded as in violation of this amendatory section.

SEC. 6. *Guarantees Against Decline.*—To make or give to any purchaser of alcoholic beverages any guarantee or allowance in any form against or as a result of decline in the seller's price thereof; except pursuant to a contract made prior to the effective date of this Code.

SEC. 7. *Prizes and Premiums.*—To offer any prize, premium, gift, or other similar inducement to either a trade or consumer buyer.

SEC. 8. *Control of Retail Outlets.*—To hold any interest in any license for the sale of alcoholic beverages at retail for consumption on the premises; or, directly or indirectly, to participate or engage in the sale of alcoholic beverages at retail for consumption on the premises; or to control, employ, manage, or financially assist in any manner, any person engaging in the retail sale of alcoholic beverages for consumption on the premises; or to hold any interest in any premises on which alcoholic beverages are sold at retail for consumption on the premises, unless the holding of such interests is permitted

under regulations of the Administration or a statement thereof has been filed with the Administration and has not been disapproved by it; provided that this section shall not be held to prohibit the granting of the credits ordinarily extended by the industry with respect to the sale of alcoholic beverages.

SEC. 9. *Sales to Unauthorized Vendors.*—To sell or otherwise dispose of alcoholic beverages to any person not authorized by license, in full force and effect, to sell, manufacture, or distribute alcoholic beverages, if such a license is required of such person by any State law or political subdivision thereof; or to sell or otherwise dispose of alcoholic beverages to any member of an industry covered by any code under the Act pertaining to alcoholic beverages, if such member is engaged in business without a permit in full force and effect under such code and such a permit is required by the Code, provided, however, that such sales (or other disposition) shall not be deemed a violation of the Section if such sale or disposition was made in good faith by the member of the industry.

SEC. 10. *Violations of State Law.*—To transport or import alcoholic beverages into any State or political subdivision thereof for delivery, sale, or use therein in violation of the law of such State.

SEC. 11. *Exclusive Outlets.*—To exact or require, by contract, understanding, or otherwise, that any trade buyer, who is engaged in the sale of alcoholic beverages at retail for consumption on the premises, handle or sell only the products of a particular member of the industry.

APPENDIX B

AUG. 15, 1947.

SIR:

There is transmitted herewith a draft of a proposed bill, "To amend the Federal Alcohol Administration Act, as amended."

The proposed bill would: (1) amend section 5 (c) of the Federal Alcohol Administration Act (U. S. C., title 27, sec. 205 (c)) to make conditioning of the purchase of any distilled spirits, wine or malt beverages upon, or "tying in" such purchase with, the purchase of any other distilled spirits, wine or malt beverages an unlawful inducement under that subsection; and (2) amend section 4 (g) of that Act (U. S. C., title 27, sec. 204 (g)) to make more definite and certain the time for the automatic termination of basic permits in cases of transfer through acquisition of control of the permittee.

The first proposed amendment is designed to bring so-called "tie-in" sales within the prohibitions of the Act. During the period of wartime scarcities the practice of "tie-in" sales grew up and flourished in the liquor industry. Under this practice suppliers of liquor to trade buyers made the purchase of scarce items such as whiskey, especially the more popular brands of whiskey, conditional upon the purchase by such buyers of other distilled spirits or wines which were in more plentiful supply and for which there was less consumer demand. For example, a retail dealer or a wholesale dealer desiring to make a purchase of whiskey urgently needed in his business

would be required by the distiller or other supplier, as a condition of such purchase, to buy an equal or greater quantity of other distilled spirits or wines which he did not want and for which he had no market. Transactions of this nature made it necessary for the Department to determine whether such practices violated the provisions of the Federal Alcohol Administration Act, as amended, directed against 'unfair competition and unlawful practices. The Department reached the conclusion that such practices violated the provisions of sections 5 (a) and 5 (b) of the Act (U. S. C., title 27, secs. 205 (a) and 205 (b)) where the transactions were of a nature to affect interstate or foreign commerce. In the absence of a provision in the statute expressly dealing with "tie-in" sales, however, it was decided to institute proceedings for the revocation or suspension of the basic permits of suppliers instead of attempting criminal prosecutions. Such proceedings were instituted in numerous cases, with the result that many suppliers agreed in writing to discontinue such practices. This disposition of the cases was due to doubt on the part of the Department as to whether violations of the statute could be established through the "tie-in" sales. It was contended by members of the industry that "tie-in" sales were not within the purview of sections 5 (a) and 5 (b) and that those sections were designed to prevent the creation of exclusive outlets and tied-houses only. In view of the situation it is believed the Act should be so amended as definitely to vest the Department with authority to act in such cases. It is proposed to accomplish this result by adding at the end of section 5 (c) a new clause as follows:

"(c) by conditioning the purchase of any distilled spirits, wine, or malt beverages upon, or 'tying in' such purchase with, the purchase

of any other distilled spirits, wine, or malt beverages; or”

This proposed amendment has been tacked on to section 5 (c) of the Act for the reason that the prohibitions of this section, unlike those of sections 5 (a) and 5 (b), run to transactions with any “trade buyer”, which term as defined in the Act includes both wholesale and retail dealers.

The second proposed amendment is deemed advisable on account of a ruling made by a Circuit Court of Appeals in *Mid-Valley Distilling Corporation v. Louis De Carlo, Acting Supervisor, Alcohol Tax Unit, District No. 3* (C. C. A., 3rd, No. 9232, filed April 29, 1947), involving the automatic termination of a basic permit. Section 4 (g) of the Federal Alcohol Administration Act (U. S. C., title 27, sec. 204 (g)), the pertinent provisions of which are hereinafter quoted, provides for the automatic termination of basic permits where there is transfer by operation of law or through acquisition of control of the permittee. This provision was so construed by the court as to continue in effect a basic permit where there had been successive transfers of control of the permittee through acquisition of stock ownership and an application for a new permit had been made within thirty days after each such change. This construction will defeat the purpose of the Act because under it a permit could be continued in existence indefinitely by the engineering of another change of control each time before the application covering the previous change could be considered and acted upon. Under such circumstances it would be very-difficult, if not impossible, to prevent the permit from falling into the hands of bootleggers and other law violators. Under the ruling of the case cited above, and if other Circuit Courts of Appeal should follow that decision, the ad-

ministration of the permit system would be very seriously affected. In order to forestall such a situation the Department believes the provision should be amended to eliminate any question regarding its meaning.

Section 4 (g) of the Act in pertinent part declares that

"if transferred by operation of law or if actual or legal control of the permittee is acquired, directly or indirectly, whether by stock ownership or in any other manner, by any person, then, such permit shall be automatically terminated at the expiration of thirty days thereafter: *Provided*, That if within such thirty-day period application for a new basic permit is made by the transferee or permittee, respectively, then the outstanding basic permit shall continue in effect until such application is finally acted on by the Secretary of the Treasury."

The purpose here was to have basic permits automatically terminate in cases of transfer by operation of law or through acquisition of control of the permittee at the expiration of thirty days after the transfer or change of control occurred, except that if the transferee or the permittee (in case of change of control) filed an application for a new basic permit within such thirty-day period then the old basic permit would continue in effect until final action was taken on *such application*.

The legislative history of section 4 (g) of the Act indicates that it was the intention of the Congress to provide for the continuance of the old permit in such cases for a limited time only, pending application for a new permit and action thereon. (1935) H. R. Rpt. No. 1542, 74th Cong., 1st Sess. 9-10. It was apparently not contemplated that the old permit should continue in effect indefinitely through succes-

sive transfers by operation of law or acquisitions of actual or legal control, merely if an application for a new permit were filed within thirty days after each such change. While such continued existence of the permit through successive transfers by operation of law may not be hazardous, the contrary is true in respect of successive acquisitions of actual or legal control of the permittee because this would afford a means to bootleggers and other law violators to evade the permit system. In view of the court ruling, and in order to avoid further controversy on the point, and, possibly, a serious impediment to effective administration of the permit system, it is believed that section 4 (g) should be so amended as to make the time of the termination of the permit in cases where actual or legal control of the permittee is acquired by stock ownership or other means more definite and certain. This may be done by adding at the end of section 4 (g) a new proviso as follows:

“Provided further, That if during such thirty-day period or during the pendency of such application the actual or legal control of the permittee shall be acquired by stock ownership or in any other manner, then, notwithstanding the provisions of section 9 (b) of the Administrative Procedure Act (Public Law 404, Seventy-ninth Congress; 60 Stat. 242), the outstanding permit shall automatically terminate thereupon.”

With respect to the phrase in the proposed proviso, “notwithstanding the provisions of section 9 (b) of the Administrative Procedure Act (Public Law 404, Seventy-ninth Congress; 60 Stat. 242)”, section 9 (b) of the Administrative Procedure Act provides, in part, that in any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no

license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency. Section 12 of the Administrative Procedure Act provides that no subsequent legislation shall be held to supersede or modify the requirements of that Act except to the extent that such legislation shall do so expressly. In order to eliminate any question arising as to the application of section 9 (b) to the automatic termination of permits contemplated by the proposed amendment, express language has been included to remove any doubt in the matter.

It is the view of the Department that the proposed amendments will strengthen the Federal Alcohol Administration Act and enactment of the bill is recommended.

There is enclosed for your convenient reference a comparative type showing the changes in existing law made by the proposed bill. It is requested that you lay the proposed bill before the Senate. A similar bill has been transmitted to the Speaker of the House of Representatives.

The Department has been advised by the Bureau of the Budget that there is no objection to the submission of this proposed legislation to the Congress.

Very truly yours,

(Signed) A. L. M. WIGGINS,
Acting Secretary of the Treasury.

THE PRESIDENT OF THE SENATE

AT: L: WCH:

KMcD: HAR: ma 5/8/47

[Identical letter sent to The Speaker of the House of Representatives]

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JOHN T. FEE, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 14

JOSEPH F. BLACK, ASSISTANT REGIONAL COM-
MISSIONER, ALCOHOL AND TOBACCO TAX
DIVISION (DALLAS REGION), INTERNAL
REVENUE SERVICE,

Petitioner,

versus

MAGNOLIA LIQUOR COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

MOISE S. STEEG, JR.,
STEEG, SHUSHAN AND PRADEL,
Attorneys for Magnolia Liquor Co., Inc.,
Respondent.

313 Richards Building,
New Orleans, La.,

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BRIEF FOR THE RESPONDENT.

QUESTION PRESENTED.

The sole question in this matter is whether tie-in sales by a wholesale liquor dealer licensed under the Federal Alcohol Administration Act constitute a violation of the provisions of Sections 5(a) and 5(b) of the Act.¹

¹ 27 U. S. C. 205 (a) and (b).

STATEMENT.

Magnolia Liquor Company, Inc., respondent, is engaged in the wholesale liquor business in New Orleans, Louisiana and as such holds a basic permit pursuant to the Federal Alcohol Administration Act. During 1952, administrative proceedings seeking the revocation of this permit were instituted on the ground that:

- a) Each and every sale made by respondent to ten named retailers from December 1, 1950 to March 31, 1951 were tie-in sales constituting a wilful violation of Sections 5(a) and 5(b) of the Act to such an extent as substantially to restrain and/or prevent transactions in interstate commerce, and that
- b) Respondent was guilty of wilful infraction of certain technical record keeping requirements of the Act.²

The Hearing Officer found adversely to respondent on both charges and recommended a suspension of the permit for a period of forty-five (45) days.³ Upon administrative appeal, the Director of the Alcohol and Tobacco Tax Division reversed the Hearing Officer as to the second count,⁴ affirmed him as to the first count, and reduced the sanction to a suspension of fifteen days.⁵ Upon appeal to the United States Court of Appeals for the Fifth Circuit

² R. 2-5. The exact language is quoted in Appendix "A" with our emphasis added.

³ R. 188.

⁴ R. 152-155.

⁵ R. 135-156.

the decision of the Director of the Division was set aside and reversed on the ground that tie-in sales are not prohibited by Sections 5(a) and 5(b) of the Federal Alcohol Administration Act. *Magnolia Liquor Co., Inc., v. Black*, 231 F. (2d) 941 (1956).

Although the issue now presented is primarily one of statutory interpretation, because of the wide variance between the presentation of the facts by petitioner and the statement of the case by the Court below (and the interpretation of the facts by respondent), we restate them here.⁶

Respondent is the exclusive wholesale distributor of Seagram products in the greater New Orleans area; it is likewise the distributor of other brands and other lines. Respondent does a gross annual business of approximately \$6,000,000 and serves some twenty-six hundred (2600) retailers. A Special Investigator of the Alcohol and Tobacco Tax Division interviewed twenty-eight of these retailers to determine if respondent was participating in tie-in sales. The Investigator testified that in his effort to ascertain tie-in sales, he selected isolated and unrelated invoices for the purpose of demonstrating a pattern of sales. As a result of this investigation, ten retailers were named in the rule to show cause; of these, only eight were called as witnesses; from these eight, just seven gave testimony from which the Examiner found that they had bought plentiful items in order to obtain scarce items. Two of

⁶ This statement of fact is a liberal adoption and reorganization of the language of the opinion of Circuit Judge Jones. Where facts have been added, reference to the record has been made.

these seven sales were made by representatives of the distiller—not by respondent, who merely filled an order placed with them by the distiller's representative.⁷ One of the sales characterized as having been made on a "tie-in basis" was not established by the proof.⁸

Some of the witnesses testified that they had to buy Seagram 7 Crown or Seagram Gin (plentiful items) to get Seagram VO or Johnny Walker Scotch (scarce items); one said he was required to buy Seagram Gin to get Seagram 7 Crown (both plentiful items).

During the period involved, respondent sold 7,067 cases of Seagram VO, 29,049 cases of 7 Crown and 2,050 cases of Gin. The volume of the items in the so-called tie-in sales was 26 cases of Seagram VO, 5 cases of Scotch and 64½ cases of Seagram 7 Crown and 12 cases of Seagram Gin.⁹

The retailers involved in these alleged tie-in sales all testified that they were not subject to any domination or control by the respondent and that they carried in inventory and bought such other brands as their business required.¹⁰

⁷ R. 100, 33, 58.

⁸ The Head of the Division, acting as Appellate Officer, so held. R. 149.

⁹ An analysis of the proof regarding the extent of tie-in sales is found in detail in Appendix "B", *infra*.

¹⁰ Gillen, R. 27, 28; Lopiccolo, R. 37; Argy, R. 43, 44. Trosatly, R. 50, 51; Crosby, R. 55, 56; New, R. 63; Sinopolis, R. 67; Lopiccolo, R. 35; Gillen, R. 26; Argy, R. 42; Reba, R. 46; Trosatly, R. 51; Crosby, R. 57; New, R. 63.

SUMMARY OF ARGUMENT.

The Federal Alcohol Administration Act was enacted after the repeal of prohibition and succeeded the Codes of Fair Competition, which regulated the industry until they were rendered unenforceable by the decision in *Schechter Poultry Corp. v. United States*, 295 U. S. 495. Section 5 of the Act is devoted to "unfair trade practices". This section does not expressly prohibit tie-in sales. (Letter by Treasury Department to Secretary Pro Tem of Senate dated August 15, 1947, Appendix D).

By application of the basic canons of statutory interpretation, tie-in sales should not be read into Sections 5(a) and 5(b) of the Act.

This statute carries with it both civil and criminal sanctions enforceable by the Government only, and is therefore a penal statute. Black, "*Construction and Interpretation of the Laws*" (2nd Ed.), p. 472. As such it should be strictly construed, but in so doing the language should be interpreted so as to manifest the legislative intent. *Securities and Exchange Commission v. Joiner*, 320 U. S. 344.

Although tie-in sales were a recognized trade practice at the time the Act was passed, they were never discussed on the floor of Congress nor were they included in the committee reports on the legislation. (See Appendix C). These discussions were limited to practices described as "Exclusive Outlet" and "Tied House".

The Section Headings use these terms in describing the offenses defined in the sections. It is proper to con-

sider such headings in interpreting a statute which is ambiguous. *Knowlton v. Moore*, 178 U. S. 41; *Maguire v. Commissioner*, 313 U. S. 1.

Tie-in sales were not the subject of discussion by Congress because the object of Sections 5(a) and 5(b) of the Act was to prevent domination and control of the retailer by the wholesaler. Whereas monopolistic control is implicit in an "Exclusive Outlet" or a "Tied House", such is not the case where tie-in sales are involved. Tie-in sales, such as charged in this case, limited in product and time, relate to the lessening of competition and abridgement of the choice of the retailer but not to his domination and control by the wholesaler. *Times Picayune Company v. United States*, 345 U. S. 594. This basic difference between "Exclusive Outlet" and "Tied House" on one hand and "Tie-In Sales" on the other demonstrates that the Congress did not intend that tie-in sales fall within the scope of Section 5 of the Federal Alcohol Administration Act.

It is argued by the Government that the statute should be enlarged to include tie-in sales because the Codes of Fair Competition were expanded by the statute to include partial exclusive outlets and tied houses and because the Congress declared that it hoped to stamp out "Exclusive Outlets" and "Tied Houses" in their incipiency. We argue to the contrary:

In 1947 the Secretary of the Treasury addressed a letter to the President Pro Tempore of the Senate, in which it was stated that the Treasury Department doubted whether tie-in sales were prohibited by the Act. The let-

ter goes on to request that this be remedied by passing an amendment to the statute which would specifically define and prohibit tie-in sales (Appendix D). Subsequently on two different occasions such an amendment was proposed in Congress. All three were rejected.

Therefore it appears that had it been the intent of the Congress to include tie-in sales as an unfair trade practice defined and prohibited by Section 5, it would have enacted the amendment submitted to it on three separate occasions to make this a definite provision of the law. Their failure to do so is a powerful indication that it was not their original intent to include tie-in sales under the Act.

Prior to the decision of the court below, the matter of *Distilled Brands v. Dunigan*, 222 F. (2d) 867 held that tie-in sales did constitute violation of Section 5 of the F.A.A. Act. This case is based upon the proper legal proposition that a contemporaneous and consistent administrative interpretation is entitled to weight in determining the meaning of an ambiguous statute. *Fox v. Standard Oil Company of New Jersey*, 294 U. S. 87. This is a major argument of the Government, which relies heavily on the *Distilled Brands* case. The Court below distinguished the *Distilled Brands* case by pointing out that it did not have before it the language of the Congressional discussions or material and did not have before it the letter by the Treasury Department to the Senate (Appendices C & D). The court below properly determined that there was no contemporaneous and consistent administrative interpretation to act as to guide in interpreting the statute:

In 1946 the Treasury Department issued rules *nisi* against wholesalers charging violations of Section 5 alleging tie-in sales. None of these were brought to trial but all dismissed on stipulation. In our case the stipulation provided that it should not prejudice the respondent in future proceedings. (R. 9). Then, in 1947 the Department wrote Congress the letter referred to above. Twice, subsequently, it tried to obtain an amendment to the statute, providing a specific definition of tie-in sales and making them a violation of the Statute. It issued no interpretation, no directive, no definition of or regulation relating to tie-in sales from 1935 when the F.A.A. Act was enacted to 1946 when the stipulations were entered into; or from 1947 when the letter was written, to 1952 when this case arose. Such conduct is not indicative of any contemporaneous, consistent or forceful position of the administrative agency which should carry great weight with the Courts.

It is respondent's position that Sections 5(a) and 5(b) of the Federal Alcohol Administration Act does not expressly prohibit tie-in sales; that upon application of these recognized canons of statutory interpretation there appears no basis upon which to enlarge the scope of the Act to include such a practice.

ARGUMENT.

Tie-In Sales Are Not Expressly Prohibited By Act:

After repeal of the Eighteenth Amendment, the alcohol beverage industry was regulated by the Codes of Fair Competition adopted under the National Industrial

Recovery Act. These Codes dealt with specific unfair trade practices peculiar to the liquor industry, and provided:

"ARTICLE V—UNFAIR METHODS OF COMPETITION (EXCLUDING PRODUCTS OF THE BREWING INDUSTRY)

"The following practices constitute unfair methods of competition and shall not be engaged in with respect to alcoholic beverages by any member of the industry. Such practices shall not apply to the distribution of the products of the brewing industry.

* * *

"Sec. 11. EXCLUSIVE OUTLETS.—To exact or require, by contract, understanding, or otherwise, that any trade buyer, who is engaged in the sale of alcoholic beverages at retail for consumption on the premises, handle or sell only the products of a particular member of the industry."

After the *Schechter* case,¹¹ when the Codes became unenforceable, Congress undertook intensive study of the problems relating to the regulation of the liquor industry. Trade practices were given serious consideration in connection with the proposed legislation, and were discussed in detail on the floor of the Congress and in both the Senate and House reports.¹² When the Statute was enacted, Section 5 was devoted to "Unfair Trade Practices".

¹¹ *Schechter Poultry Corp. v. United States*, 295 U. S. 495.

¹² We have quoted these provisions in full in Appendix "C". All emphasis are ours.

Section 5 does not expressly prohibit tie-in sales.¹³

Section 5(a) deals with "Exclusive Outlets" and Section 5(b) deals with "Tied Houses". In order for sanctions to be asserted against respondent as charged, it is necessary that the language of Sections 5(a) and 5(b) of the Act be construed to apply to that conduct which would constitute a tie-in sale as defined by the Treasury Department, thus:

27 U.S.C.A. 205(a)

It shall be unlawful for any person engaged in business as a . . . wholesaler, of distilled spirits, wine, or malt beverages, . . .

EXCLUSIVE OUTLET

To require, by agreement or otherwise, that a retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce . . .

27 U.S.C.A. 205(b)

It shall be unlawful for any person engaged in business as a . . . wholesaler, of distilled spirits, wine, or malt beverages, . . .

"TIED HOUSE".

To induce through any of the following means any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce.

. . . (7) by requiring the retailer to take and dispose of a certain quota of any of such products; . . .

27 U.S.C.A. 205(c)

It shall be unlawful for any person engaged in business as a . . . wholesaler, of distilled spirits, wine, or malt beverages, . . .

COMMERCIAL BRIBERY¹⁴

To induce any trade buyer engaged in the sale of distilled spirits, wine or malt, beverages to purchase any such products from such person; . . .

. . . (3) by conditioning the purchase of any distilled spirits, wine, or malt beverages upon, or "tying in" such purchase with the purchase of any other distilled spirits, wine or malt beverages.

¹³ The Treasury Department expressed this view in their letter of August 15, 1947 addressed to the President Pro Tempore of the Senate. The full text of this letter is found in Appendix "D" of this brief and Appendix "B", p. 31 of the Government's brief.

¹⁴ This definition is found in the letter by the Treasury Department to the Senate dated August 15, 1947, Appendix "D".

The Statute Should Not Be Broadened by Construction:

Section 5 of the Act carries with it both civil and criminal penalties.¹⁵ Only the Government has the right to enforce the Statute, and there are no provisions affording a civil remedy to an aggrieved party. Therefore, we urge that the offenses proscribed by the Act should be confined to those specifically and unequivocally defined by the express language of the Statute itself:

"In general it is said that when a prohibitory act gives the right to enforce the penalty for its violation to the party aggrieved, it will be construed as remedial in its nature; but it is a penal act when such right is given to the public or the government."

Black, "*Construction and Interpretation of the Laws*" (2nd Ed.), at p. 472.

A penal statute should be strictly construed. *United States v. Wiltberger*, 5 Wheat. 76; *Huntington v. Attrill*, 146 U. S. 657; see, *Tiffany v. Missouri National Bank*, 18 Wall. 409; *Providence Steam Engine Co. v. Hubbard*, 101 U. S. 188.

In *Trenton Beverage Co. v. Berkshire*, 151 F. (2d) 227 (C. C. A., 3rd, 1945), the Treasury Department sought the revocation of a wholesaler's basic permit, alleging that the wholesaler violated the Emergency Price Control Act. In holding conditioning of a basic permit upon compliance with "federal laws" did not include laws not relating specifically to the beverage industry, the Court stated that the

¹⁵ Civil - 27 U. S. C. 204; Criminal - 27 U. S. C. 207.

Federal Alcohol Administration Act should be strictly applied:

"Finally, we observe that under the decisions of the Supreme Court, the penalty provisions of the Alcohol Act should be construed rather strictly. . . ." (151 F. (2d) 227, at p. 229).

The best discussion that we are able to find of the principles of statutory interpretation applicable to such a Statute is in the matter entitled *Securities and Exchange Commission v. Joiner*, 320 U. S. 344. This case involved the construction of the Securities and Exchange Act. It was urged that because violations of the S.E.C. Act involved "crimes", it should be interpreted with strictness. Mr. Justice Jackson, as the organ of the Court, reviewed the jurisprudence on this subject. He pointed out that there are decisions which require strict construction; that there is a vast array of authorities which consider the Statute remedial; that there are others which are inclined to a strict construction when a criminal penalty is being imposed and a liberal one when civil remedies are being applied. He then goes on to say:

"The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. * * * It is said, that notwithstanding this rule, the intention of the law-maker must govern in the construction of penal, as well (as) other statutes. This is true. But this is not a new independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as

to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases, which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend."

United States v. Wiltberger, 5 Wheat. 76, 95, 5 L. Ed. 37.

"This rule in substance was repeated in *United States v. Hartwell*, 6 Wall. 385, 396, 18 L. Ed. 830, which said also:

"The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent."

Under this canon of statutory interpretation, we believe that in a case such as this the offense charged should lie squarely within the language of the Statute.¹⁶

There is nothing in the expressed legislative policy relating to this Statute to indicate that Congress gave the

¹⁶ There is a great mass of jurisprudence relating to the subject of strict and liberal interpretation of statutes. Some of this is reviewed in the *Joiner case*, *supra*. The *Joiner case* provides, as is quoted in the body of the brief, that the object of statutory interpretation is to reach the legislative intent. We reconciled in our minds the determination of legislative intent and the strict interpretation of a statute as one which will give full force to the words and language of an Act without expanding it beyond its definite scope.

remotest consideration to tie-in sales when considering the trade practices to be prohibited by Section 5 of the F.A.A. Act.

Headings of Sections 5(a) and 5(b) Do Not Designate Tie-in Sales:

The heading of a section of a statute, while not conclusive, is proper to be considered in interpreting the statute where ambiguity exists.¹⁷ Section 5(a) is entitled "Exclusive Outlet" and Section 5(b) is entitled "Tied House". "Tie-in Sales" is not synonymous with either "Exclusive Outlet" or "Tied House" and their omission from the headings is therefore of significance.¹⁸

Congress Did Not Intend to Prohibit Tie-in Sales by Section 5 of the Act:

Not only did Congress not designate the Section in question as prohibiting tie-in sales, but in its discussion of the Statute, tie-in sales were never mentioned. When the Federal Alcohol Administration Act was passed, Congress was intent upon preventing the recurrence of specific trade practices which had created certain evils leading to prohibition. It is true that the language of the Statute and

¹⁷ *Knowlton v. Moore*, 178 U. S. 41; *Maguire v. Commissioner*, 313 U. S. 1.

¹⁸ In its footnote at p. 22, it is argued in petition that the weight of these headings should be minimized as a factor in statutory interpretation. We have not and do not urge that these headings are exclusive or binding. But the cases cited by the Government are clearly not applicable here for the section headings were given special consideration by the legislature when considering the Act; they were the very basis of the discussions. See Appendix "C", cf. *Hadden v. McColleck*, 5 Wall 107. Further, the text is not complicated; it consists of three brief paragraphs. cf. *Railroad Trainmen v. B. L. O. R. Co.*, 331 U. S. 519.

the language of the Codes differ, and that the "Tied House" provision was an added provision. It is further true that Congress hoped to prevent the reprobated trade practices "in their incipency"—but what Congress set out to prevent were situations of monopolistic control of the retail outlet by the wholesaler.¹⁹ Domination and control is implicit in the concepts of "Exclusive Outlet" and "Tied House".

However, in "Tie-in Sales" the gravamen is not so much control, but rather the "suppression of competition"²⁰ because such sales cause the "abdication of the buyer's independent judgment as to the tied products' merits."²¹

¹⁹ We have quoted as far as possible the full language of the House Report, the Senate Report and other references to Section 5 in our Appendix "C". A reading of the full language and not isolated provisions out of context, such as "in its incipency" and practices "analogous to those prohibited by the anti-trust laws", will sustain our basic contention that the primary reason for Sections 5(a) and 5(b) is to prohibit practices tending to product monopolistic control by wholesalers of retail outlets, and that there is considerable reference to "Exclusive Outlets" and "Tied Houses" by the Congress but none to "Tie-in Sales".

²⁰ *Standard Oil of Calif. v. U. S.*, 337 U. S. 293 at p. 305.

²¹ *Times-Picayune Pub. Co. v. U. S.*, 345 U. S. 594 at p. 605.

This position is substantially supported by the argument of the Government that where there is a tie-in sale it is assumed that the sale of another product is excluded from the market. There is considerable discussion of this phase of tie-in sales in the Government's brief but we find no discussion as to how exclusions can constitute an incipient monopoly. Pp. 13-15 of Petitioner's brief. As a matter of fact, such an assumption is refuted by the testimony of the witnesses in this case. In effect they testified, in some cases, that the purchase of the combination of products did not interfere with the purchase of other products; some testified that the effect of the combination purchase was merely to delay future purchases of Respondent's product, and competitors testified that they sold whatever they had on hand, and accordingly, we do not see where there was any lessening of competition by the so-called "Tie-in Sales". See Footnote No. 10.

The development of "Tied-in Sales" as an unfair trade practice relates primarily to the lessening of competition, and has been developed by a series of cases over the years and in connection with those Statutes relating to the regulation of commerce, such as the Federal Trade Commission Act, the Sherman Anti-Trust Statute and the Robinson-Patman Act.²² It cannot be argued, however, that Congress did not have reason to know of the existence of tie-in sales when the F.A.A. Act was under consideration. This Court had held in *Federal Trade Commission v. Gratz*, 253 U. S. 421 (1920) that tie-in sales were not illegal *per se*, so Congress knew that tie-in sales might be practiced between liquor wholesalers and retailers. But Congress was concentrating on those situations where by threatening to exclude the retailer from all its resources, the wholesaler could exert undue control over the retailer's purchases—that is to say "Exclusive Outlets" and "Tied Houses"—not "Tie-In-Sales".

The essential difference between the three trade practices is best seen by illustration:

²² The F. A. A. Act was enacted in 1935. The concept of tie-in sales was developed through the following cases and the **Standard Oil case** (note 19 *Supra*) and **The Times-Picayune case** (note 20, *Supra*) were all decided after the F. A. A. Act was passed.

Landis Machinery Co. v. Chaso Tool Co., 141 F. (2d) 800 (6th Cir 1944) *cert. denied*, 65 S. Ct. 52, 323 U. S. 720 (1944). (Action for patent infringement, Clayton Act).

Mercoird Corp. v. Minneapolis-Honeywell Regulator, 320 U. S. 680 (1944). (Patent infringement).

International Salt Company v. United States, 322 U. S. 392, (1947). (Sherman Anti-Trust and Clayton Acts).

United States v. Paramount Pictures, 334 U. S. 131 (1948). (Sherman Anti-Trust Act).

Standard Oil Co. v. United States, 337 U. S. 293 (1949). (Clayton Act).

An EXCLUSIVE OUTLET is Where the Wholesaler Requires the Retailer to Handle or Sell Only the Products of the Wholesaler (Whether That Product is All or Part of the Retailer's Stock) as a Condition to Being Allowed to Buy From the Wholesaler.²³

In other words, Section 5(a), EXCLUSIVE OUTLET, pertains to a situation where the wholesaler requires the retailer to buy absolutely all of the retailer's stock from the wholesaler; or where, if the wholesaler has only one line or brand, all of that particular line or brand from the wholesaler; or where the wholesaler requires the retailer to buy all of one type of liquor from him, such as all straight whiskeys, blended whiskeys, imported whiskeys, scotch—otherwise the wholesaler will not sell anything to the retailer.

A Tied House Is Where a Retailer Is Required to Take a Certain Quota of His Inventory From the Wholesaler As a Condition to Being Allowed to Buy From the Wholesaler:²⁴

In other words, Section 5(b) TIED HOUSE, pertains to a situation where the wholesaler requires the retailer to acquire a definite proportion of his inventory purchases from the wholesaler as a condition to being allowed to buy anything from the wholesaler.

²³ This is generally a restatement of the Codes of Fair Competition and consistent with the language of the House Report in (HR 8870) at p. II where the practice is called an "exclusive purchasing agreement".

²⁴ This is a paraphrase of the language used by Mr. Lewis of Colorado discussing the "tied house" provisions. See Appendix "C".

A Tie-in Sale Is the Conditioning or Tying in of the Purchase of One Product With the Purchase of Another Product.²⁵

A TIE-IN SALE, such as in this case alleged, involves requiring the purchaser to buy a plentiful item in order to get a scarce item. But such conditioning does not foreclose the products of the wholesaler from the retailer; he can buy both products; he can still buy the plentiful item; he can buy anything else the wholesaler has; or he can refuse to buy at all. But there is no domination and control over the retailer by the wholesaler.

It is urged by counsel for the Government that tie-in sales should be read into the Statute because Congress declared it was the purpose of the Statute to prevent monopolistic control "in its incipency". However, we know that on at least three occasions, Congress had an opportunity to be certain that tie-in sales were a violation of the Statute and that Congress did not see fit to provide this certainty of language.

On August 15, 1947, the Under Secretary of the Treasury addressed a letter to Congress to the effect that the Treasury Department was in doubt that it could successfully impose sanctions for tie-in sales; that, therefore, it, the Treasury Department, requested an amendment to the Statute to provide in Section 5(c) express language prohibiting tie-in sales.²⁶ After this request, on two other occasions the Treasury Department caused amendments to be introduced into Congress, which amendments sought to

²⁵ This is the definition contained in the letter referred to heretofore. Appendix "D".

²⁶ Appendix "D".

make tie-in sales a violation of the Statute. On each occasion, the proposed amendments were rejected.²⁷

It is far more logical to reason, therefore, that if Congress had originally intended to prohibit tie-in sales by virtue of the "Exclusive Outlet" and "Tied House" provisions, when the agency in charge of the enforcing of the Act was in doubt that it accomplished such avowed purpose, Congress would have clarified the ambiguity by enacting the proposed amendment. Since Congress did not do so, *a fortiori*, it was not their original intention to prevent tie-in sales by the use of Sections 5(a) and 5(b) of the Act.²⁸

²⁷ 93 Cong. Rec. 10570 (1947):

"AMENDMENT OF FEDERAL ALCOHOL ADMINISTRATION ACT, AS AMENDED

A letter from the Acting Secretary of the Treasury, transmitting a draft of proposed legislation to amend the Federal Alcohol Administration Act, as amended (with an accompanying paper); to the Committee on Finance.

H. R. 3248, 95 Cong. Rec. 1896 (1949):

"A bill to amend the Federal Alcohol Administration Act, as amended, to the Committee on Interstate and Foreign Commerce".

H. R. 7600, 98 Cong. Rec. 4446 (1952):

"A bill to amend the Federal Alcohol Administration Act, as amended, to the Committee on Interstate and Foreign Commerce".

²⁸ See *United States v. Bergh*, U. S. , 77 S. Ct. 106 1956 at p. 109, where the Court said:

"... This opinion was followed consistently by all of the departments and agencies of the Government. In this regard it is of importance to note that several efforts were made to repeal this interpretation by specific Acts of Congress, but in each instance the bill failed to pass. This contemporaneous interpretation of the 1938 Resolution by the agency charged with its supervision—an interpretation followed by all agencies of the Government—together with the acquiescence of the Congress, must be given great weight". (Emphasis supplied).

There Is No Contemporaneous and Consistent Administrative Construction to Support the Decision in *Distilled Brands v. Dunigan*:

It is a major contention of the Government and is the basis of the holding in the case of *Distilled Brands v. Dunigan*, 222 F. (2d) 867 (C. C. A., 2nd, 1956) that there has been a settled administrative construction of the Act supporting their position. The contemporaneous interpretation of a Statute by the administrative agency charged with the responsibility of enforcing it is entitled to respectful consideration, although the Court has the right to disregard it. *Fox v. Standard Oil Company of New Jersey*, 294 U. S. 87 at p. 96. To be a help to the Court in finding the meaning of a Statute such administrative construction should be both contemporaneous and consistent.²⁹ Here it was neither.

In construing this statute, the Court in *Distilled Brands v. Dunigan*, said:

"We agree with the position of the Division that tie-in sales do constitute a sufficient interference with competition to require prohibition within the regulatory scheme of the Federal Alcohol Administration Act, and that Section 5, 27 U. S. C., Section 205, actually covers such transactions. . . . We see no reason so to limit the statute. The broader reading given to Section 5 by the administrative tribunal below is in accordance with the

See *Alstate Construction Co. v. Durkin*, 345 U. S. 13 at p. 17.

"We decline to repudiate an administrative interpretation of the Act which Congress refused to repudiate after being repeatedly urged to do so."

²⁹ See *United States v. Bergh*, *Supra* and *Alstate Construction Co. v. Durkin*, *Supra*.

construction put thereon by the Treasury Department since 1946. This construction is of considerable weight, particularly when it is so eminently reasonable in the light of the over-all purposes of this regulatory statute."

When the Second Circuit Court of Appeals took this position, it did not have before it the references to Congressional material or the letter addressed to Congress by the Treasury Department. Therefore, the court below, in treating with the *Distilled Brands* case said:

"The opinion in *Distilled Brands v. Dunigan*, supra, gives to Section 5 the 'broader reading' of the administrative tribunal, and finds such to be in accord with 'the construction put thereon by the Treasury Department since 1946'. Since it does not appear from the opinion in the *Distilled Brands* case that the letter of the Acting Secretary was before the court, we assume that the court was entitled to find from the evidence before it that there had been a continuous and confident administrative construction consonant with its contention there and here asserted."

The court below had cogent reasons for not finding any contemporaneous and forceful administrative construction of this Statute to guide it:

"Here we have the Alcohol and Tobacco Tax Division construing the Act in 1946 as prohibiting tie-in sales. But the Division had no such confidence then in its interpretation as to seek enforcement by sanctions. Instead, it sought stipulations.

It confessed its doubts as to whether violations could be established through tie-in sales. It recognized the contention of members of the industry that tie-in sales were not prohibited. It sought to have the doubt resolved by an amendment to the Act bringing tie-in sales within the prohibited practices. The Congress did not see fit to grant the administrative request. Counsel for the Government say to us that the simple introduction of a bill to amend a statute, without any further proceedings thereon, 'is without meaning for the purposes of statutory interpretation,' citing *Order of Railway Conductors v. Swan*, 469 , 329 U. S. 520, 67 S. Ct. 405, 91 L. Ed. 471. A recognition of such a principle would not preclude us, in our 'labors to discover the design' of the framers of the Act from seizing upon the expressed doubts of the Treasury Department as an aid to construction. The Division recognized that the language of Section 5 was ambiguous by not attempting, in 1946, to apply the sanctions of the Act to those making tie-in sales. There was a further recognition of the ambiguity in the letter from the Acting Secretary to the President Pro Tempore of the Senate. The doubt which was then recognized by the Treasury Department and its Alcohol and Tobacco Tax Division has not been dispelled from our minds. We resolve that doubt in favor of the appellant and hold that the Act does not prohibit tie-in sales."

In answer to this, the Government seeks to minimize the doubt expressed by the Treasury Department as a doubt born from the contentions advanced by the vari-

ous wholesalers and not a doubt based upon the weakness of the Statute. We submit that a reading of the letter will show that such is not the case. The letter says, in this order:

1. "The Treasury Department transmits an amendment to section 5 of the FAA Act designed to bring so called 'tie-in' sales within the prohibitions of the Act.
2. "In the absence of a provision in the Statute expressly dealing with 'tie-in sales', proceedings for revocation or suspension of basic permits were instituted instead of criminal action.
3. "These proceedings were dismissed on stipulation 'due to doubt' on the part of the Department as to whether violations of the Statute could be established through 'tie-in' sales.
4. "It was contended by members of the industry that 'tie-in sales' were not within the purview of the Act.
5. "The Act should be amended as definitely to vest the Department with authority to act on 'tie-in' sales."

Considering this letter, two other attempts to amend the Statute, and the stipulation entered into with respondent providing that it should not prejudice the respondent in any other proceedings,³⁰ we doubt whether there was any contemporaneous administrative interpretation to be considered in construing this Statute.

³⁰ Government Exhibit 29, R. 9.

By way of summary, therefore, we believe that it was never the intention of the Congress that tie-in sales should be the basis of civil or criminal sanctions against a wholesaler charged with violations of Sections 5(a) and 5(b) of the Act because:

- a) The heading of the Section did not include this particular offense;
- b) In considering the legislation, Congress did not discuss or consider tie-in sales in connection with alcoholic beverage regulations;
- c) The very nature and basis of tie-in sales is fundamentally different from the offense included in the Statute in that it relates to an interference with competition rather than with domination or control, and
- d) Had Congress originally intended that tie-in sales should be prevented by Sections 5(a) and 5(b) of the Act, having been advised by the Treasury Department that they questioned the adequacy of the language of the Statute, Congress would have passed clarifying amendments thus erasing such doubt.

CONCLUSION.

It is respectfully submitted for the reasons above that the judgment of the United States Court of Appeals for the Fifth Circuit holding that tie-in sales are not a vio-

lation of the Federal Alcohol Administration Act is correct and should be affirmed.³¹

Respectfully submitted,

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Respondent.

³¹ In the event this Court does not affirm the decision as we have requested, this matter should be remanded to the Fifth Circuit Court of Appeals for further action. That court said: "The appellant, in addition to the contention that tie-in sales are not prohibited by the Act, urges other grounds for reversal. Some of these, we think, have merit but the view which we have taken makes a determination of them unnecessary".

APPENDIX "A"

1. You did willfully violate Section 5 of the Federal Alcohol Administration Act (Section 205, Title 27, United States Code) upon compliance with which (among other things) your wholesaler's basic permit (No. 10-P-784), issued pursuant to Section 4 of said Act, was conditioned, in that:

(a) Between December 1, 1950, and March 31, 1951, you did to such an extent as substantially to restrain and/or prevent transactions by other persons in interstate and/or foreign commerce in distilled spirits and/or wine, willfully engage in the practice of *requiring*, by agreement or otherwise, divers and sundry retailers engaged in the sale of distilled spirits and/or wine in Orleans, Jefferson, and St. Tammany Parishes, Louisiana, *to purchase from you with each purchase* of Johnny Walker's Scotch or Seagram's V. O. certain quantities of distilled spirits and/or wine to the exclusion in whole or in part of distilled spirits and/or wine sold and offered for sale by other persons in interstate and or foreign commerce, in violation of subsection (a) of Section 5 of the said Federal Alcohol Administration Act.

(b) Between December 1, 1950, and March 31, 1951, you did to such an extent as substantially to restrain and/or prevent transactions by other persons in interstate and/or foreign commerce in distilled spirits and/or wine, willfully engage in the practice of *inducing* divers and sundry retailers engaged in the sale of distilled spirits and/or wine in Orleans, Jefferson, and St. Tammany Parishes, Louisiana, *to purchase from you* distilled spirits and/or wine to the exclusion in whole or in part of distilled spirits and/or

wine sold or offered for sale by other persons engaged in interstate and or foreign commerce, by requiring such retailers *to take and dispose of a certain quantity* of such distilled spirits and/or wine *with each purchase* of Johnny Walker's Scotch or Seagram's V. O., in violation of subsection (b) of Section 5 of the Federal Alcohol Administration Act.

(c) The divers and sundry retailers referred to in the preceding paragraphs identified as 1(a) and 1(b) are:

Richard J. Gillen—t/a Pat's Bar, 2215 Jefferson Hwy., Jefferson Ph., La.

Sam Lopiccolo—t/a Jack's Inn, 7½ mile Post, Gentilly Road, New Orleans, La.

John Reba—t/a Front and Society Bar, 119 Exchange Place, New Orleans, La.

Frank Trosatty—t/a Frank's Bar, 751 St. Charles St., New Orleans, La.

Roy P. Brechtel—t/a Brechtel's Bar, 1509 S. Jeff. Davis Pkwy., New Orleans, La.

Jack New—t/a The New Bar, 8634 Pontchartrain Blvd., New Orleans, La.

Bing Crosby—t/a Bing Crosby's Liquor Store, 1756 Front St., Slidell, La.

Gus Argy—t/a Argy's Steak House and Bar, 119-121 University Place, New Orleans, La.

Paul B. Lemann—t/a Lafitte Hotel and Bar, 1003 Bourbon St., New Orleans, La.

Anthony Sinopolis—t/a Paramount Restaurant, and Bar, 733 Iberville St., New Orleans, La.

2. You did knowingly and willfully violate Section 1101, Title 18, and Section 2857, Title 26, United States Code,

and the regulations prescribed under such Section 2857 by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, upon compliance with which (among other things) your wholesaler's basic permit (No. 10-P-784), issued pursuant to Section 4 of the Federal Alcohol Administration Act, was conditioned in that:

(a) Between some day and date prior to December 1, 1950, the exact time being unknown, and January 31, 1952, while engaged in the business of a wholesale liquor dealer as defined by Section 2857, Title 26, United States Code, you through your officers, agents, servants, and employees, did willfully, knowingly, and unlawfully make false and fraudulent entries in records required to be kept by law and regulations, which records are commonly known as Wholesale Liquor Dealers' Record (Forms 52-A and 52-B), by showing in column 5 of such forms and record that certain distilled spirits were bottled, rectified or distilled at Rectifying Plant 153, which rectifying plant 153 is located at Lawrenceburg, Indiana, and by showing in column 6 of such forms and record that certain distilled spirits were bottled, rectified or distilled in Indiana, when in truth and in fact such distilled spirits, known as Seagram's V. O., were distilled and/or rectified and bottled in Canada; which false and fraudulent entries were made for the purpose of and with the intention to deceive the Supervisor, 10th District Alcohol and Tobacco Tax Division, formerly known as the Alcohol Tax Unit, Bureau of Internal Revenue, such entries relating to a matter within the jurisdiction of a department and agency of the United States.

APPENDIX "B"

The following summary of the sales to these 7 retailers is an effective display of the infinitesimal nature of the proof in this case:

V. O. 7-Crown Gin

1. Total of alleged sales to named retailers proven by Government	26	64 1/4	12
2. Total of all sales of sim- ilar Items by Permittee	7,067	29,049	2,050

Permittee's "Exhibit M" shows the relation of Permittee's total sales to the retailers named in the citation, and is repeated here for emphasis:

	Total Sales 12/1/50 to 3/31/51	Sales to Named Retailers	Percentage
V.O.	7,067	26	36/100 of 1%
7-Crown	29,049	64 1/4	22/100 of 1%
Gin	2,050	12	58/100 of 1%
Johnny Walker	1,485	5 1/2	34/100 of 1%
Cordials	300	1	33/100 of 1%

But when related to total wholesale sales in Louisiana, the proportions become even more infinitesimal:

	All Sales Proven at Hearing	Total Purchases for 1951 by Wholesalers	Percentage
Cordials	1	32,770	3/100,000 of 1%
Vermouth	5	12,344	4/ 10,000 of 1%
Gin	22	190,479	1/ 10,000 of 1%
7-Crown	142-1/8	527,692	27/100,000 of 1%

These computations do not include ten cases of gin and one hundred of Seagram 7-Crown sold to retailer Gillen on which he was granted a cash discount on the purchase.

Permittee Exhibit No. P-N

Total Number of Cases of Items Sold by Location Named in Citation During December, 1950, January, February and March, 1951 According to Government Proof.

	7- V.O. Crown		Gin	Cordials & Scotch Vermouth	
Pat's Night Club, Richard Gillen	3	10		5	1 5
Jack's Inn, Sam Lop- icolo	13½	41	6		
Front & Society Bar, John Reba	½		½		
Frank's Bar, Frank Trosatty	1	4¼			
Tortorich Rest. & Bar, Jack New	1	1			
Bing Crosby's	4	6		2	
Argy's Place, Gus Argy	3	1	2½		
Paramount Rest. & Bar, Tony Sinopoli		2		1/12	
Totals	26	64¼	12	5-1/12	1 5

This information is condensed from Permittee's Exhibits I, M and N, R. 12-15 inclusive.

APPENDIX "C"

HOUSE REPORT NO. 1542; 74th Congress,
1st Session 1935, 10

"Under the code system a voluntary code for the brewing industry (already in existence at the time of repeal as a result of 3.2 beer legislation of March 22, 1933) was approved by the President. At the same time, the President imposed codes upon the other alcoholic beverage industries, namely, the distillers, rectifiers, importers, wholesalers, and wine producers. By Executive order under the National Industrial Recovery Act the President established the Federal Alcohol Control Administration to administer these codes and certain related functions. *The bill embodies in statutory form so much of the former code system as the committee now deems appropriate and within the constitutional power of Congress to enact. In general, it may be said that the bill incorporates the greater part of the system of Federal control which was enforced by the Government under the codes.*"

SENATE REPORT NO. 1215; 74th Congress,
1st Session, (1935) 7

"The bill embodies in statutory form so much of the former code system as the committee now deems appropriate and within the constitutional power of Congress to enact. In general, it may be said that except with respect to malt beverages the bill as amended by the committee incorporates the greater part of the system of Federal control which was enforced by the Government under the codes."

CONGRESSIONAL RECORD, VO. 79, NO. 152,

P. 12270; 74th Congress, 1st Session,

(1933) '6, 7

"Mr. Lewis, of Colorado. Mr. Chairman, this is a further restriction on the so-called 'tied house', which is regulated under section 5(b) of this bill. Before prohibition, in our part of the country at least, one of the evils of the liquor traffic was that a retailer was required by the brewer or distiller to take a certain quota of beer or spirits of some private brand as a condition to being allowed to retail that brand. The temptation was often irresistible for the retailer to induce customers to buy drinks when they had already had quite enough. This was a very great evil, as I believe the members of the committee will concede. I think this is an important amendment to this bill. I hope the committee will accept the amendment."

H. R. 1542, 74th Congress, 1st Session (1935)

"The tied-house provisions; it should be noted, relate to the *acquisition by industry members of control over theretofore independent retail establishments* and do not prohibit industry members from continuing to operate retail outlets heretofore established by them and wholly owned and operated by them, nor the establishment by industry members of new retail outlets of such character."

Both committees reporting on HOUSE REPORT 8870 carefully explained the purposes of Section 5: *Idem*, p. 11.

"These prohibited practices fall in two general categories, those relating to *monopolistic control* of retail outlets and those relating to labeling and advertising."

"The House Bill (Sec. 5) prohibited 2 classes of trade practices. The first class of these prohibited practices were those which tended to produce monopolistic control of retail outlets, such as arrangements for *exclusive outlets*, creation of *tied houses*, commercial bribery, and sales on consignment with privilege of return. * * *

"The second class of unfair practices prohibited by the bill are those relating to false labeling and false advertising."

"Three other types of practices which are closely related to, and have *constituted additional means of effecting, the 'tied house'* are also prohibited. These practices are *exclusive* purchase agreements with retailers (sec. 5(a)); commercial bribery of a trade buyer, or the offering or giving of any bonus, premium or compensation to the officers or employees of a trade buyer (sec. 5(c)); and deliveries to a trade buyer on consignment or conditional sales, or sales with the privilege of return, or sales on any basis other than a bona-fide sale (sec. 5(d))."

"The foregoing practices have in this industry constituted the principal abuses whereby interstate and foreign commerce have been restrained and *monopolistic control* has been accomplished or attempted. The most effective means of preventing monopolies

and restraints of trade in this industry is by prohibiting such practices, thereby striking at the causes for restraints of trade and *monopolistic conditions* and dealing with such conditions in their incipency.

"Furthermore, such abuses were so prevalent before prohibition that they were regarded in a large measure as responsible for the evils which led to prohibition. (See Report of the National Commissioner on Law Observance and Enforcement (1931), H. Doc. No. 722, 71st Cong., 1st sess., P. 6' and Fossdick and Scott, *Toward Liquor Control* (1933), pp. 42-43.) The prohibition of these practices will, accordingly, not only *prevent monopoly* and restraint of interstate trade but will also tend to eliminate or mitigate certain incidental social evils, such as those which have necessarily followed the forced increase in alcoholic-beverage sales resulting from the "tied-house'."

APPENDIX "D"

Aug. 15, 1947.

Sir:

There is transmitted herewith a draft of a proposed bill, "To amend the Federal Alcohol Administration Act, as amended."

The proposed bill would: (1) amend section 5 (c) of the Federal Alcohol Administration Act (U. S. C., title 27, sec. 205 (c)) to make conditioning of the purchase of any distilled spirits, wine or malt beverages upon, or "tying in" such purchase with, the purchase of any other distilled spirits, wine or malt beverages an unlawful inducement under that subsection; and (2) amend section 4 (g) of that Act (U. S. C., title 27, sec. 204 (g)) to make more definite and certain the time for the automatic termination of basic permits in cases of transfer through acquisition of control of the permittee.

The first proposed amendment is designed to bring so-called "tie-in" sales within the prohibitions of the Act. During the period of wartime scarcities the practice of "tie-in" sales grew up and flourished in the liquor industry. Under this practice suppliers of liquor to trade buyers made the purchase of scarce items such as whiskey, especially the more popular brands of whiskey, conditional upon the purchase by such buyers of other distilled spirits or wines which were in more plentiful supply and for which there was less consumer demand. For example, a retail dealer or a wholesale dealer desiring to make a purchase of whiskey urgently needed in his business would be required by the distiller or other supplier, as a condition of such purchase, to buy an equal or greater quantity of other

distilled spirits or wines which he did not want and for which he had no market. Transactions of this nature made it necessary for the Department to determine whether such practices violated the provisions of the Federal Alcohol Administration Act, as amended, directed against unfair competition and unlawful practices. The Department reached the conclusion that such practices violated the provisions of sections 5 (a) and 5 (b) of the Act (U. S. C., title 27, secs. 205 (a) and 205 (b)) where the transactions were of a nature to affect interstate or foreign commerce. In the absence of a provision in the statute expressly dealing with "tie-in" sales, however, it was decided to institute proceedings for the revocation or suspension of the basic permits of suppliers instead of attempting criminal prosecutions. Such proceedings were instituted in numerous cases, with the result that many suppliers agreed in writing to discontinue such practices. This disposition of the cases was due to doubt on the part of the Department as to whether violations of the statute could be established through the "tie-in" sales. It was contended by members of the industry that "tie-in" sales were not within the purview of sections 5 (a) and 5 (b) and that those sections were designed to prevent the creation of exclusive outlets and tied-houses only. In view of the situation it is believed the Act should be so amended as definitely to vest the Department with authority to act in such cases. It is proposed to accomplish this result by adding at the end of section 5 (c) a new clause as follows:

“(c) by conditioning the purchase of any distilled spirits, wine, or malt beverages upon, or ‘tying in’ such purchase with, the purchase of any other distilled spirits, wine, or malt beverages; or”

This proposed amendment has been tacked on to section 5 (c) of the Act for the reason that the prohibitions of this section, unlike those of sections 5 (a) and 5 (b), run to transactions with any “trade buyer”, which term as defined in the Act includes both wholesale and retail dealers.

The second proposed amendment is deemed advisable on account of a ruling made by a Circuit Court of Appeals in *Mid-Valley Distilling Corporation v. Louis De Carlo, Acting Supervisor, Alcohol Tax Unit, District No. 3* (C. C. A., 3rd, No. 9232, filed April 29, 1947), involving the automatic termination of a basic permit. Section 4 (g) of the Federal Alcohol Administration Act (U. S. C., title 27, sec. 204 (g)), the pertinent provisions of which are hereinafter quoted, provides for the automatic termination of basic permits where there is transfer by operation of law or through acquisition of control of the permittee. This provision was so construed by the court as to continue in effect a basic permit where there had been successive transfers of control of the permittee through acquisition of stock ownership and an application for a new permit had been made within thirty days after each such change. This construction will defeat the purpose of the Act because under it a permit could be continued in existence indefinitely by the engineering of another change of control each time before the application covering the previous change could be considered and acted upon. Under such circumstances it would be very difficult, if not im-

possible, to prevent the permit from falling into the hands of bootleggers and other law violators. Under the ruling of the case cited above, and if other Circuit Courts of Appeal should follow that decision, the administration of the permit system would be very seriously affected. In order to forestall such a situation the Department believes the provision should be amended to eliminate any question regarding its meaning.

Section 4 (g) of the Act in pertinent part declares that

“if transferred by operation of law or if actual or legal control of the permittee is acquired, directly or indirectly, whether by stock ownership or in any other manner, by any person, then such permit shall be automatically terminated at the expiration of thirty days thereafter: *Provided*, That if within such thirty-day period application for a new basic permit is made by the transferee or permittee, respectively, then the outstanding basic permit shall continue in effect until such application is finally acted on by the Secretary of the Treasury.”

The purpose here was to have basic permits automatically terminate in cases of transfer by operation of law or through acquisition of control of the permittee at the expiration of thirty days after the transfer or change of control occurred, except that if the transferee or the permittee (in case of change of control) filed an application for a new basic permit within such thirty-day period then

the old basic permit would continue in effect until final action was taken on *such application*.

The legislative history of section 4 (g) of the Act indicates that it was the intention of the Congress to provide for the continuance of the old permit in such cases for a limited time only, pending application for a new permit and action thereon. (1935) H. R. Rpt. No. 1542, 74th Cong., 1st Sess. 9-10. It was apparently not contemplated that the old permit should continue in effect indefinitely through successive transfers by operation of law or acquisitions of actual or legal control, merely if an application for a new permit were filed within thirty days after each such change. While such continued existence of the permit through successive transfers by operation of law may not be hazardous, the contrary is true in respect of successive acquisitions of actual or legal control of the permittee because this would afford a means to bootleggers and other law violators to evade the permit system. In view of the court ruling, and in order to avoid further controversy on the point, and, possibly, a serious impediment to effective administration of the permit system, it is believed that section 4 (g) should be so amended as to make the time of the termination of the permit in cases where actual or legal control of the permittee is acquired by stock ownership or other means more definite and certain. This may be done by adding at the end of section 4 (g) a new proviso as follows:

"Provided further, That if during such thirty-day period or during the pendency of such application the actual or legal control of the permittee shall be acquired by stock ownership or in any other man-

ner, then, notwithstanding the provisions of section 9 (b) of the Administrative Procedure Act (Public Law 404, Seventy-ninth Congress; 60 Stat. 242), the outstanding permit shall automatically terminate thereupon."

With respect to the phrase in the proposed proviso, "notwithstanding the provisions of section 9 (b) of the Administrative Procedure Act (Public Law 404, Seventy-ninth Congress; 60 Stat. 242)", section 9 (b) of the Administrative Procedure Act provides, in part, that in any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency. Section 12 of the Administrative Procedure Act provides that no subsequent legislation shall be held to supersede or modify the requirements of that Act except to the extent that such legislation shall do so expressly. In order to eliminate any question arising as to the application of section 9 (b) to the automatic termination of permits contemplated by the proposed amendment, express language has been included to remove any doubt in the matter.

It is the view of the Department that the proposed amendments will strengthen the Federal Alcohol Administration Act and enactment of the bill is recommended.

There is enclosed for your convenient reference a comparative type showing the changes in existing law made by the proposed bill. It is requested that you lay the proposed bill before the Senate. A similar bill has been transmitted to the Speaker of the House of Representatives.

The Department has been advised by the Bureau of the Budget that there is no objection to the submission of this proposed legislation to the Congress.

Very truly yours,

(Signed) A. L. M. WIGGINS,
Acting Secretary of the Treasury.

The President of the Senate

AT:L:WCH:

KMcD:HAR:ma 5/8/47

[Identical letter sent to The Speaker of the
House of Representatives]

[Emphasis ours]